

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

T2186

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH DE LORRAINE

Plaintiff-
Appellant

-against-

MEBA PENSION TRUST, Representing
the National Marine Engineers'
Beneficial Association, and
MILDRED E. KILLOUGH, Individually
and in her capacity as Administrator
of the MEBA Pension Trust

Defendants-
Appellees

Appeal From the
United States District
Court for the Southern
District of New York

A P P E N D I X

E. Judson Jennings
Legal Services for
the Elderly Poor
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Oct. 17-72 Filed complaint & issued summons. (Docket Sheet)

Nov. 1-72 Filed summons & complaint with marshals return:
 "Served"

Meba Pension Trust - Mildred E. Killough as an individually on 10-24-72.

Meba Pension Trust - Mildred E. Killough, both copies to be served, on M.Killough or agent of the fund, the other on her individually.

Nov. 21-72 Filed stip & order that deft's time to answer complaint is ext. from, 11-13-72 to 12-13-72. So ordered. Tyler, J.

Dec. 13-72 Filed deft's (Meba Pension Trust & M.E. Killough) affidavit & notice, of motion ret. before Tyler, J. on 12-29-72 to dismiss complaint.

Dec. 13-72 Filed deft's memorandum in support of their motion to dismiss complaint.

Feb. 21-73 Filed OPINION #39225: Pltff's cross motion is denied. Let judgment be entered dismissing the action. So ordered. Tyler, J. mailed notice.

Feb. 21-73 Filed deft's affidavit & notice of motion for summary judgment ret. before Tyler, J.

Feb. 21-73 Filed deft's reply memorandum.

Feb. 21-73 Filed pltff's memorandum of law in opposition to deft's motions to dismiss.

Feb. 21-73 Filed pltff's reply memorandum.

Feb. 26-73 Filed Judgment: Ordered that the deft's Meba Pension Trust, Representing the National Marine Engineer's Beneficial Association and Mildred Killough, individually and in her capacity as Administrator

of the Meba Pension Trust, have judgment against the pltff, Joseph DeLorraine, dismissing the complaint. Judgment Ent. Clerk Ent. 2-26-73.

- Mar. 8-73 Filed pltff's affidavit & notice of motion to alter or amend a judgment. ret. before Tyler, J. on 3-16-73.
- Mar. 15-73 Filed stip & order that motion of pltff. to amend decision & judgment, ret. 3-16-73 is ect. to 4-6-73. So ordered. Tyler, J.
- Mar. 27-73 Filed Pltffs. Notice of Appeal. (n/m)
- Apr. 3-73 Filed notice of motion: Ret. 4/6/73 at 10A.M. Room 1305; Re: dismissing comp.
- Apr. 3-73 Filed memo in opposition to pltff. motion to alter or amend judgment, support of motion to dismiss.
- Apr. 11-73 Filed affdvt. of Joseph DeLorraine.
- Apr. 11-73 Filed pltfs. memo in support of his motion for an order vacating judgment herein and granting leave to file an amended comp.
- Apr. 16-73 Filed stipulation and order extending the hearing on the motion of pltff to alter or amend the decision and judgment, from 4/13/73 to 4/27/73. So ordered. Tyler, J.
- Apr. 9-73 Filed stip and order extending time to answer until 4/13/73. TYLER, J.
- Apr. 25-73 Filed Affdvt. of Charles Black.
- Apr. 25-73 Filed Affdvt. of Leon Shapiro
- Apr. 25-73 Filed Defts. reply memo.
- Jun. 8-73 Filed affdvt. of Judson Jennings.
- Jun. 8-73 Filed Reply memo of Jonathan Weiss.

Jun. 8-73 Filed MEMO. #39538: By way of opinion filed 2/21/73, this court granted defts. motion for summary judgment, and ordered the action dismissed. March 8, 1973, plttf. filed a notice of motion to alter or amend a judgment and for leave to serve and file an amended comp.***Pltfs. motion made pursuant to Rules 15 and 59, on the ground that justice so requires. ***At the threshold, defts. contend that this court is without jurisdiction to entertain pltfs. motion because of a pending appeal.***Although there is mixed authority for refusing leave to amend a complaint which is jurisdictionally defective even after the proposed amendment, defts. do not raise the issue. *** The parties shall have 14 days from the filing of this memo to render whatever other submissions they care to in respect to the summary judgment motion. SO ORDERED. TYLER, J. (n/m).

Jun. 22-73 Filed Amended Comp.

Jun. 25-73 Filed affdvt. of Judson Jennings, Re: opposition to defts. motion for summary judgment.

Jun. 25-73 Filed plttf. memo of law.

Nov. 26-73 Filed OPINION #40045. Since no structural defect in establishment of pension trust has been alleged, court lacks subject matter jurisdiction to hear this complaint. Case is therefore dismissed. So Ordered. Tyler, J. (n/m)

Dec. 17-73 Filed Plttf Joseph DeLorraine's Notice of Appeal from order granting deft's motion to dismiss amended complaint filed Nov. 26, 1973 and from order grant-

ing deft's motion to dismiss complaint or for summary judgment filed on Feb. 26, 1973. (Mailed copy to Proskauer, Ross, Goetz & Mendelsohn on Dec. 19, 1973).

COMPLAINT

I. PRELIMINARY STATEMENT

This is an action for a declaratory judgment, injunctive relief, and damages for defendant's improper and unlawful actions against the Plaintiff in depriving him of his right to work in the maritime industry in violation of Federal Laws against age discrimination as well as the Constitution and By-Laws of the National Marine Engineers' Beneficial Association [hereinafter MEBA].

II. JURISDICTION

1. Plaintiff is a citizen and resident of the State of New York.
2. This action arises under sections 623(f)(2) and 623(c) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et. seq. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.
3. Jurisdiction is also conferred on this court by 29 U.S.C. 626 and 28 U.S.C. §1331.
4. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure, which relates to declaratory judgments and remedies, and Rule 65 of the Federal Rules of Civil Procedure, relating to injunctions.

III. PLAINTIFF

1. Plaintiff is a marine engineer. He has been a

member of Defendant union for over 30 years and is a participant in the Defendant MEBA Pension Trust Plan.

IV. DEFENDANTS

1. The Defendant MEBA Pension Trust is the Marine Engineers' Benevolent Association Pension Trust Fund of the National Marine Engineers' Beneficial Association.

2. Mildred E. Killough is Administrator of the MEBA Pension Trust and is responsible for its administration.

V. STATEMENT OF FACTS

Plaintiff is a marine engineer. As such, he must be licensed by the United States government and be a member of the Defendant Union in order to practice his trade. He has been a member in good standing of the National Marine Engineers' Beneficial Association [hereinafter MEBA] and of the pension trust fund created by said union for more than thirty years.

In 1964, Plaintiff had accumulated twenty years of pension credit. He was 46 years of age. He elected to receive pension benefits from the fund under the "swinging door" policy then in effect.

The "swinging door" policy permitted members to receive pension benefits for a period of time and then return to full-time work, provided only that they did not finally retire and had continued to be "available for work" during the time benefits were being drawn. The "available for work" requirement could be met either by regular registration for work or by continuance of membership in the union. MEBA Pension Trust Regulations, Ar-

ticle III, §5(A).

Solely in reliance upon the "swinging door" policy, the Plaintiff elected to temporarily cease working and to draw pension benefits. Far from retiring, he meticulously preserved his union membership and thus his "availability for work." This distinction was expressly recognized in MEBA Pension Trust Regulations, Article II. §13, which provides:

"Section 13. RETIREMENT DEFINED. To be considered retired an employee must withdraw completely from and further employment aboard any vessel documented under the laws of the United States or any other country or aboard any vessel covered by any collective bargaining agreement of the Association and provided further the Employee has deposited with the Plan satisfactory documentary proof that he has withdrawn from membership in the Association and has surrendered his seaman's papers to the appropriate Government authority."

From 1964 to 1968, Plaintiff maintained his position by retaining union membership. In 1968, he exercised his right to return to work as provided for in Article II, §14 of the Regulations:

"Section 14. RE-EMPLOYMENT OF PENSIONERS.

(A) A Pensioner may return to Covered Employment and subsequently retire again on a pension under this Plan without penalty except for the loss of pension payment during the period of re-employment provided such Pensioner notifies the Trustees in writing and receives the permission of the Trustees prior to the date of his re-employment."

.....

Plaintiff relied upon the Regulations in effect when he stopped working in 1964, when he paid union dues from 1964 to 1968, and when he returned to work in 1968. None of the defendants in any way negatived his understanding. In 1970, without warning, the trustees of the defendant MEBA Pension Trust adopted a resolution cancelling permission to return to work.

This had the effect of making Plaintiff's temporary cessation of employment in 1964 a binding permanent act of retirement. The resolution also required all workers in Plaintiff's class to surrender their merchant mariner's document, sign a declaration of retirement, and withdraw from MEBA union membership.

On February 11, 1972, Plaintiff was placed in retirement pursuant to the resolution.

The National MEBA, the American Maritime Association, and other employers have for several years been giving assistance and are now giving active assistance to younger persons in obtaining employment aboard vessels in preference to older persons by operating a training school for persons desiring to become marine engineers. While these younger persons remain students at the training school, and upon their graduation, they are discriminatorily assisted in finding employment aboard vessels in preference to older marine engineers, the same being accomplished through discriminatory operation of a joint employer-union hiring hall. Moreover, the MEBA receives an initiation fee of one thousand dollars for each new member.

The motive and intent of defendants in passing and applying the 1970 resolution is to prematurely retire workers of Plaintiff's class in order to facilitate the recruitment of new workers for the profit of the defendants.

This matter is not within the jurisdiction of the New York State Human Rights Division, as per the decision of that agency rendered December 23, 1971.

Plaintiff has exhausted his administrative remedies under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et. seq. On July 19, 1972, a notice of intent to sue was

sent to the Secretary of Labor. More than sixty days has elapsed since said notification was sent.

VI.
CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The course of conduct of Defendants violates the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 et. seq. Section 623(c) of the Act provides in part:

"(c) It shall be unlawful for a labor organization...(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age; (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

Section 623(f) of the Act provides:

"It shall not be unlawful for an employer, employment agency, or labor organization - * * *
(2) To observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act..." [Emphasis supplied.]

The actions of defendants in passing the 1970 resolution calling for resignation from the union and surrender of merchant mariner's papers constituted an attempt to circumvent the purposes of the Act by imposing a retroactive mandatory retirement upon Plaintiff based upon a decision to leave work temporarily under existing regulations and practices. This scheme is not in furtherance of the interests of older employees, but is rather an attempt to force

them out prematurely in order to make room for young newcomers who pay high initiation fees.

SECOND CLAIM FOR RELIEF

Plaintiff stopped working in 1964 under a system which permitted him to return to work upon election. In 1968, he exercised his right to return to work. In 1970, a resolution was passed which had the effect of making Plaintiff's 1964 decision to stop working a binding election to retire permanently from his profession, at the age of 46. Defendants' actions in passing and applying the 1970 resolution to Plaintiff constituted a breach of the pension agreement between Plaintiff and Defendants.

THIRD CAUSE OF ACTION

The actions of Defendants in 1970, taken after Plaintiff's open and reasonable reliance upon Defendants' earlier "swinging door" policy, are unlawful under the doctrines of ordinary estoppel and promissory estoppel, and therefore cannot be enforced against the Plaintiff.

FOURTH CAUSE OF ACTION

Article 6, §6(b)(1) of the 1970 Constitution of the National Marine Engineers' Beneficial Association assures full and equal rights among the membership within Pension Plans.

Prior to the Defendants' demand that Plaintiff submit his Merchant Mariner's License, Plaintiff satisfied the eligibility requirements for membership in the National MEBA as set forth in Article 3, §1(c) of the National Constitution. See Appendix A.

Prior to the involuntary termination of his membership in December, 1971, Plaintiff had met all of the requirements for

membership in good standing as set forth in Article 13 of the National MEBA Constitution and in Article 7 of the Constitution for Districts. See Appendix B.

Prior to the involuntary termination of his membership in the MEBA, Plaintiff's membership status was in accordance with the provisions in Article 20, §8 of the By-Laws of District No. 1, MEBA. See Appendix C.

The circumstances surrounding the Defendants' demand upon Plaintiff that he retire from Marine Engineering and resign from the MEBA constituted a clear violation of the Constitution of the National and District Associations and of the By-Laws of District No. 1, MEBA.

FIFTH CAUSE OF ACTION

Plaintiff is subject to Article II of the MEBA Pension Trust Regulations, rather than to Article II-A, since his pension became effective prior to June 16, 1968.

Plaintiff was not at any time prior to 1971 in retirement as defined in Article II, §13 of the MEBA Pension Trust Regulations.

Plaintiff's actions prior to December, 1971 were in compliance with Article II, §14 of the MEBA Pension Trust Regulations.

Article II, §14 of the MEBA Pension Trust Regulations, which provides for the Re-Employment of Pensioners, contains no language which limits or conditions said re-employment except for the loss of pension payment during the period of re-employment.

Defendants' revocation of permission to Plaintiff to return to work was a clear violation of the MEBA Pension Trust Regulations, and said revocation was to the substantial detriment of Plaintiff.

VII.
PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays, on behalf of himself, that this Honorable Court:

1. Assume jurisdiction of this cause and set this case down promptly for a hearing.
2. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57 and 58 declaring that the revocation of the permission and refusal of continued re-employment to Plaintiff JOSEPH de LORAINÉ contravenes the provisions in §§623 (c) (2) and 623(f) (2) of the Age Discrimination in Employment Act of 1967.
3. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57, and 58 declaring that the revocation of the permission for re-employment to Plaintiff violates the Articles of the National and District MEBA Constitutions before mentioned as well as the 1971 By-Laws of District No. I, MEBA.
4. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57 and 58 declaring that the defendants were estopped from revoking the permission granted Plaintiff to return to work because of their previous actions and because of Plaintiff's reliance upon said actions.
5. Enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to reinstate Plaintiff JOSEPH de LORAINÉ to membership in good standing in the National MEBA and to his status as a non-retirement pensioner eligible for

re-employment in accordance with the Regulations of the MEBA Pension Trust.

6. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow Plaintiff his costs herein and grant him five hundred thousand dollars in damages, both compensatory and punitive, and grant such additional or alternative relief as this Honorable Court may deem just, proper, and equitable.

VIII.
JURY DEMAND

Plaintiff respectfully demands a trial by Jury.

Respectfully submitted,

S/
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Association shall be to elevate and maintain the rights and advance and safeguard the economic and working conditions of its members and otherwise labor for their better protection and advancement.

Section 2. The jurisdictional rights of the National Association shall extend to all enterprises in which its members may be employed.

Article Three

Eligibility for Membership

Section 1. The following marine engineers of good moral character and known qualifications who are citizens of the United States shall be eligible for full book membership after having completed the requirements for applicants:

- (a) All marine engineers who have been licensed by the Bureau of Marine Inspection, U.S. Coast Guard, to serve as such on vessels of the United States.
- (b) Marine engineers regularly serving on commercial motor vessels operating in inland waters where license requirements have not been established by the Bureau of Marine Inspection and Navigation.
- (c) Any engineer whose United States marine license is valid, though he engage in another vocation, is eligible for membership.
- (d) Persons holding an operator's certificate, or having actually been employed as an engineer on diesel craft and having known qualifications as a diesel

"majority vote" or "majority vote of the Executive Board" shall mean a majority of the votes actually cast.

Section 5. The term "membership action" shall mean the same as the term "majority vote of the membership."

Section 6. Where the title of any office or job, or the holder thereof, is set forth in these By-Laws, all references thereto and the provisions concerned therewith shall be deemed to be equally applicable to whomever is duly acting in such office or job.

Section 7. The "Election Year" shall be deemed to mean that Calendar year prior to to the calendar year in which elected officials and other elected jobholders are required to assume office. The first election year shall be deemed to be 1969.

Section 8. The term "member in good standing" shall mean a member not in arrears or under suspension or sentence of expulsion. Unless otherwise expressly indicated, the term "member" shall mean a member in good standing.

Section 9. The term "membership book" shall mean any official certificate issued as evidence of Union membership.

Section 10. The term "Headquarters", unless otherwise indicated shall mean the office in New York.

Section 11. The term "National Constitu-

charge, for the legitimate costs incurred by him in his defense. If the final decision shall be against the accused, he shall be deemed automatically suspended or removed from his office or position in accordance with the decision of the National Executive Committee and in the case of dismissal shall be barred from holding any office, position or employment in the National Association.

Section 7. Criminal or Civil Liability Not Affected. A decision rendered in favor of or against any accused under the provision of this Article shall not in any way affect his criminal liability or his civil liability under the law to the National Association or District.

Article Thirteen

Rights and Duties of Membership

Section 1. General Rights. (a) All members are entitled to all the rights, benefits and privileges of membership set forth in this and other articles of this Constitution and in the Constitution and By-Laws of the respective Districts including the right to nominate candidates, to vote in elections or referendums, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings subject to reasonable rules and regulations in the appropriate Constitution and By-Laws, to meet, and assemble freely with other members, to express any views, arguments and opinions and to express, at meetings, his views upon candidates in any election, or

upon any business properly before the meeting, subject to the Organization's established and reasonable rules pertaining to the conduct of meetings; provided that nothing herein set forth shall be constituted to impair the right of the National Association to adopt and enforce reasonable rules as to the responsibility of every member toward the Organization as an institution, and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations. Any member falling within Section 1(d) and Section 5 of Article Three shall have a voice and vote only on such questions in which he is directly affected. Other members shall not have any voice or vote on questions affecting exclusively those members covered in Article Three, Section 1(d) and Section 5.

(b) All members visiting Districts shall satisfy the District which they visit that they are in good standing. Visiting members granted such courtesy are advised that a District meeting in executive session has the inherent right to exclude anyone other than officers and members in good standing of said District during such meeting. Visiting members shall be granted voice, but no vote, at membership meetings.

(c) Members shall, however, be bound by the Shipping Rules of the District in which they seek employment and such Shipping Rules may establish an order of priorities for filling jobs.

Section 2. General Duties. (a) All members are expected to do all in their power to

maintain the interest, the life and usefulness of the Association. They shall comply with and observe all provisions of all outstanding collective bargaining agreements of the National Association or of any District, under which they may be employed. No member shall traduce, slander, or willfully or maliciously injure the National Association, any District, or any member thereof in any way.

(b) Members charged with violations of this section shall be tried by the District where the offense has been committed in accordance with the procedures provided in its Constitution and By-Laws.

Section 3. Good Standing. Payment of Dues. No member shall be deemed in good standing unless his dues are fully paid up to and through the current quarter. Any member who shall be in arrears on his dues for a period of one year shall be dropped from membership unless otherwise ordered by the District, but in no case may such a member be retained on the membership rolls if he is in arrears for over two years' dues.

Section 4. Good Standing. Fines and Assessments. Any member who is in arrears for fines, assessments or other indebtedness to the National or District, and who does not pay same within one month, shall before being suspended or dropped have charges presented and tried in a manner provided in this Constitution, Appendix Article Nine.

Section 5. Reinstatement. Any member of a District, who has been dropped, or expelled from membership in accordance with the pro-

vision of the Constitution, can only apply for reinstatement to the District from which he was dropped, or expelled. Any member falsifying his application in this respect shall be subject to charges, and if after a due hearing as provided in this Constitution, such fact is proven, he shall forfeit all monies paid on the falsified application and be expelled from membership and the National Office shall be notified of such fact. The reinstatement fee for members dropped or expelled shall be one thousand (\$1,000) dollars, plus three months' dues in advance and any outstanding fines. Dropped members who have worked under the authority of their license while in a dropped status shall be required to pay dues and assessments while so working, in addition to the above reinstatement fee. Any application for reinstatement shall be deemed to have the same status as any application for original membership and shall be handled in the same manner as provided in this Constitution for such original application.

Section 6. Withdrawal.

(a) Members who have paid all of the indebtedness and apply in writing for a withdrawal, may be granted the same.

(b) Any subsequent application for reinstatement shall be deemed to have the same status as any application for original membership and shall be handled in the same manner as provided in this Constitution for such original application.

(c) Any MEEA member who is drafted for the Armed Services of the United States of America, or otherwise serves in a war or

MILDRED E. KILLOUGH, being duly sworn, deposes and says:

1. I am the Administrator of defendant Marine Engineers' Beneficial Association ("MEBA") Pension Trust ("Pension Trust") and make this affidavit in support of defendants' motion for dismissal of the complaint or for summary judgment, pursuant to Rule 12(b)(6) and Rule 56(b) of the Federal Rules of Civil Procedure.

2. As is set forth more fully below and in defendants' accompanying memorandum of law, defendants' motion is based on the following grounds:

a. Plaintiff is barred from bringing this action by reason of his failure to comply with the statute of limitations set forth in the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 et seq. ("the Act"), the statute pursuant to which this action purports to have been brought.

b. Neither the defendant Pension Trust nor I have at any time been an employer of plaintiff. Nor is either defendant an employment agency or a labor organization. Accordingly, neither defendant is subject to the provisions of the Act upon which plaintiff's claim is based.

c. The action of the Trustees of the Pension Trust, concerning which plaintiff complains, was taken pursuant to the terms of a "bona

fide employee benefit plan," and thus is immune from challenge under the Act.

d. On the undisputed facts, the action taken by the Pension Trusts' Trustees with respect to plaintiff did not discriminate against him on the basis of his age.

Plaintiff's Action is Barred by the
Applicable Statute of Limitations.

3. The Age Discrimination in Employment Act bars an individual from commencing a civil action until he has given the Secretary of Labor at least 60 days' notice of his intention to file such action. The Act further requires that this notice to the Secretary be given "within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individuals of notice of termination of proceedings under State law, whichever is earlier."

4. On or about April 8, 1971, plaintiff filed a complaint against the defendants herein with the New York State Division of Human Rights. As he does now in this Court, plaintiff alleged before the State Division that the Trustees of the Pension Trust had discriminated against him on the basis of age by revoking, effective April 1, 1971, permission formerly granted to him to return to covered employment from retirement status. Plaintiff asserted that such revocation was a violation of the Human Rights Law of the State of New York.

5. On May 20, 1971, the State Division dismissed the complaint, holding that there was no probable cause to believe

that the respondents named had discriminated against plaintiff in the manner alleged. A copy of that decision is annexed hereto as Exhibit A.

6. Plaintiff appealed to the State Human Rights Appeal Board, which, on December 20, 1971, affirmed the decision of the State Division. A copy of that decision of which plaintiff, on information and belief, received prompt notice, is annexed hereto as Exhibit B.

7. As the complaint (§5) in this action indicates, plaintiff did not file the statutorily-required notice with the Secretary of Labor until July 19, 1972. Since that filing was not made within 300 days after the alleged unlawful practice occurred (i.e.; on April 1, 1971), nor within 30 days after plaintiff received notice of the termination of state proceedings, plaintiff is barred from bringing this action.

Defendants are Expressly Excluded from
the Prohibition of the Act.

8. The Act prohibits discriminatory employment practices of employers, employment agencies and/or labor organizations. §623, subds. (a)-(c). Neither the Pension Trust nor I now employs or ever has employed plaintiff or any other marine engineer. Similarly, neither the Pension Trust nor I acts as an employment agency. We do not establish qualifications for employment in the maritime industry, refer marine engineers for employment, or expel individuals because of their age. The sole function of the Pension Trust and myself is to provide and administer a pension fund. Therefore, we have not and could not violate the Act.

9. Furthermore, neither the Pension Trust nor I is the agent of an employer, employment agency or labor organization. Trustees of a pension or welfare plan, while perhaps being appointees of an employer or a union, are separate and distinct from them. The legal basis for this is stated in defendants' accompanying memorandum of law.

10. Moreover, the Pension Trust's retirement plan is expressly exempt from the application of the Act. Section 623 (f) (2) of the Act exempts from the application thereof, a bona fide retirement plan or system so long as it is not a subterfuge for unlawful discrimination:

"(f) It shall not be unlawful for an employer, employment agency, or labor organization --

... (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter"

Defendants Did not Discriminate
Against Plaintiff Because of Age.

11. The regulations of the Pension Trust have, since its inception in 1955, required that in order to be eligible for a pension "an Employee must withdraw completely from any further employment" in seagoing occupations in the maritime industry. A copy of the relevant sections of the 1955 regulations is annexed hereto and submitted as Exhibit C.

12. When the plaintiff applied for a pension in May, 1964, the regulations similarly provided that "[t]o be considered retired an employee must withdraw completely from any further employment" in seagoing occupations in the maritime

industry. A copy of the amended definition of retirement adopted September 12, 1962, and in effect at the time of plaintiff's retirement in May, 1964, is annexed hereto as Exhibit D. No other change was made prior to May, 1964, in those parts of the 1955 regulations annexed as Exhibit C.

13. The regulations still require an employee to retire completely from further seagoing employment as a condition of pension eligibility. This provision is annexed hereto as Exhibit E.

14. This requirement is designed to prevent the MEBA pension, which is available after 20 years of service, irrespective of age, from being used, in effect, as "unemployment compensation" or "supplemental income." Such misuse of the pension would vastly increase pension cost and prevent the Pension Trust from providing benefits at present levels to marine engineers who are bona fide retirees.

15. If a pensioner could return to active employment whenever there was work available to him or whenever he chose to work and then return to pension status when work was unavailable or when he decided to work ashore or not to work at all, a large number of employees with 20 years of service would undoubtedly elect to receive pension benefits without actually intending to retire. This would substantially diminish the amount of funds in the Pension Trust available to pay pensions to employees who do retire and who do not seek to use the pension as a form of unemployment compensation or supplemental income. The requirement that the employee must withdraw completely from further seagoing employment prevents such use of the pension plan, limits its availability to bona fide pensioners and enables

the Pension Trust to use its limited funds to provide them with more adequate pensions. It does not reflect any discriminatory intent of any kind.

16. Plaintiff was born on May 31, 1918. In May, 1964, at age 45, he had acquired 20 years of service credits and voluntarily notified the Pension Trust that he had decided to retire. In accordance with the requirements of the Pension Trust's regulations, he executed a "Declaration of Retirement from Marine Industry," a copy of which is annexed hereto as Exhibit F, in which he stated that:

"I, Joseph de Loraine, hereby certify that I have withdrawn and shall remain completely withdrawn during my retirement from any employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement with the Association and any employment in the Association Locals or Plans.

* * *

A return to employment as noted above, without written permission from the Trustees, shall be penalized in accordance with MEBA Pension Trust Regulations."

He thus became eligible for and began to receive a pension of \$300 per month.

17. The Pension Trust Regulations had, since the inception of the Trust, provided that a pensioner may return to employment without penalty if he obtained the consent of the Trustees (Exhibits C and E, Articles II and II-A, §14[A]). Pursuant to these regulations, in February, 1968, plaintiff sought and obtained permission of the Trustees to return to employment as a marine engineer. There was at that time a

great increase in need for ships and crews to man them in order to supply United States armed forces in Vietnam, and pensioners were granted permission to return to employment in view of the national emergency.

18. On December 16, 1970, the Trustees adopted a resolution, annexed hereto as Exhibit G, which recited that "the emergency need for Marine Engineers brought about by the Vietnam War no longer existed" and provided that "each permission heretofore granted by the Trustees to a pensioner to return to Covered Employment" shall be terminated effective April 1, 1971, or at the end of any voyage on which the engineer was then sailing. Pursuant to the resolution, I notified the plaintiff by letter dated January 25, 1971, that the Trustees' permission to return to employment had been terminated effective April 1, 1971, or at the end of a then existing voyage. A copy of that letter is annexed hereto as Exhibit H.

The resolution did not distinguish or discriminate in any way among pensioners because of age.

Plaintiff's Remaining Claims Fail if
the Federal Claim Arising Under the
Act is Disposed of at the Outset and
Because the Pension Trust is not an
Agent of the Union.

19. As shown by the accompanying memorandum of law, plaintiff's second and third cause of action allege violations of common law actionable under state law. However, the doctrine of pendent jurisdiction does not give this Court jurisdiction over these claims if the federal claim is dismissed before trial.

20. Plaintiff's second and fourth causes of action

allege claims growing out of his Union membership. The Union is not a defendant herein. Furthermore, the Pension Trust is a separate entity and trustees of pension plans are separate and distinct from the union whose members receive pension benefits, and cannot be considered to be the agents of the Union, as defendants' memorandum of law demonstrates.

WHEREFORE, it is respectfully requested that defendants' motion be granted in all respects.

MILDRED E. KILLOUGH

Sworn to before me this
12th day of December, 1972.

Notary Public

DETERMINATION AND ORDER AFTER INVESTIGATION

Case No. Ia-CA-1158-71

Central CA-23848-71:

Joseph DeLorraine vs. National Marine Engineers
Beneficial Association; American Maritime Association,
MEBA Pension Trust and Mildred Killough, Administrator

*MEBA Pension
+ Welfare
de Lorraine*

On April 8, 1971, Joseph DeLorraine, who is 52 years of age, filed a verified complaint with the State Division of Human Rights charging the above-named respondents with an unlawful discriminatory practice relating to employment by denying him equal terms, conditions and privileges of employment and union membership because of his age, in violation of the Human Rights Law of the State of New York.

After investigation, the Division of Human Rights determined that there is no probable cause to believe that the respondents have engaged or are engaging in the unlawful discriminatory practice complained of. The complainant did not apply to the respondents for employment, as alleged, but for referral for employment as a marine engineer aboard vessels owned and operated by various companies. The investigation showed that the MEBA Trust has been in existence since 1955 and provides that a member may retire, after 20 years of work as a marine engineer, at a full pension irrespective of age. The complainant had elected to retire in 1964 on a full pension and agreed not to return to work as marine engineer unless he returned the pension moneys he had received as provided in the Pension Trust. He did not return his pension moneys. The resolution passed by the Trustees on December 16, 1970 terminating permission heretofore granted pensioners to return to work under the Collective Bargaining Agreement applied to all marine engineers regardless of age. There was no credible evidence to show that the complainant had been denied referral for employment or union membership because of his age.

Upon the foregoing, the complaint is ordered dismissed and the file is closed.

Case No. Ia-CA-1158-71
Central CA-23848-71

- 2 -

The complainant or any party to the proceeding before the Division may appeal this order to the State Human Rights Appeal Board, 250 Broadway, New York, New York 10007, by filing a notice of appeal within fifteen (15) days after the date of the mailing of this order.

DATED: MAY 20 1971

STATE DIVISION OF HUMAN RIGHTS

By


Albert Herchick, Regional Manager Ia

To: Mr. Joseph DeLorraine
59 Verbena Drive
Commack, New York 11725

cc: Burton H. Hall, Esq.
401 Broadway
New York, New York 10013

To: National Marine Engineers Beneficial Assoc.
17 Battery Place
New York, New York 10004
Att: Mildred Killough, Administrator

cc: Morton M. Maneker, Esq.
Proskauer Rose Goetz and Mendlesohn
300 Park Avenue
New York, New York 10022

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ORDER

APPEAL NO. 902

The above-entitled appeal having come on to be heard before the Honorable Irma Vidal Santaella on the 7th day of October 1971, and Joseph De Loraine, complainant-appellant having appeared by his Attorney Burton H. Hall, Esq., who submitted a brief and argued on behalf of complainant-appellant, and Respondent National Marine Engineers Beneficial Association having appeared by Donald Klein, Esq., who submitted a brief and argued on their behalf and Respondent American Maritime Association, having made a special appearance by Andrew E. Zelman, Esq., who submitted a brief and argued on their behalf, and Respondents MEBA Pension Trust and Mildred Killough, having appeared by Morton Maneker, Esq., who submitted a brief and argued on their behalf, and the State Division of Human Rights having appeared by Henry Spitz, Esq., General Counsel, by Alan J. Saks, Esq., Associate Attorney, who submitted a Memorandum of Law and submitted on the record, and the Board having reviewed the record and having considered the briefs and arguments of the parties, and having decided that the Order appealed from as modified is not arbitrary or capricious, it is

ORDERED that the complaint as to Respondents American Maritime Association, MEBA Pension Trust and Mildred Killough, Administrator should be and the same is hereby dismissed, it is

Exhibit A

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FURTHER ORDERED that the Determination and Order of the State Division of Human Rights as to Respondent National Marine Engineers Beneficial Association made herein on the 20th day of May 1971, as modified herein, be and the same hereby is in all other respects affirmed.

Dated: December 20, 1971

TO:
(See list attached)

STATE HUMAN RIGHTS APPEAL BOARD

J. Edward Conway
J. Edward Conway, Chairman

TO:

Mr. Joseph DeLoraine
2608 Briggs Avenue
c/o Bodzak
Bronx, New York 10458

Burton H. Hall, Esq.
401 Broadway
New York, N.Y. 10013

National Marine Engineers Beneficial Assn.
17 Battery Place
New York, N.Y. 10004

Scribner, Glanstein & Klein
50 Broadway
New York, N.Y. 10004

Att: Donald E. Klein, Esq., of Counsel

MEBA Pension Trust
17 Battery Place
New York, N.Y. 10004

Att: Mrs. Mildred Killough, Administrator

Proskauer Rose Goetz and Mendelsohn
300 Park Avenue
New York, N.Y. 10022

Att: Morton Maneker, Esq., of Counsel

Surrey, Karasik, Greene & Sehan, Esqs.
500 Fifth Avenue
New York, N.Y. 10036

Att: Andrew E. Zelman, Esq., of Counsel

Commissioner Jack M. Sable
Division of Human Rights
270 Broadway
New York, N.Y.:

Henry Spitz, Esq.
Division of Human Rights
270 Broadway
New York, N.Y.

D E C I S I O N

APPEAL NO. 902

This is an appeal from a Determination and Order after Investigation of the State Division of Human Rights dismissing the complaint which charged the above-named respondents with an unlawful discriminatory practice relating to employment by denying complainant-appellant equal terms, conditions and privileges of employment and union membership because of his age.

Complainant-appellant (hereinafter referred to as appellant) alleges in his verified complaint that on December 15, 1970, the trustees of respondent MEBA Pension Trust adopted a resolution purporting to limit the rights of certain beneficiaries who had previously accepted pensions from the MEBA Pension Trust and then had returned to work as marine engineers with the consent of respondent MEBA Pension Trust.

He further alleges that on January 15, 1971, respondent MEBA Pension Trust sent him a letter with certain forms demanding his withdrawal from employment and from membership in respondent union NMEBA on April 1, 1971.

He claims that the December 1970 resolution afforded younger members preferential treatment on the basis of age by barring from employment and from union membership older members.

He alleges that he is 52 years of age and that he will be compelled to withdraw permanently from employment and from union membership on April 1, 1971, under the threat of losing his future pension rights because of his age.

He charges respondent National Marine Engineers Beneficial Association, respondent American Maritime Association, respondents MEBA Pension Trust and Mildred Killough, Administrator, with actionable discrimination in violation of the Human Rights Law.

After dismissal of the complaint with a finding of no probable cause, appellant filed a timely appeal with this Board on June 2, 1971, wherein he contends that respondents, through the subterfuge of a retirement policy, have unlawfully discriminated against him and other expansioners-- as a class -- who had returned to employment through an "open door policy" previously in force in that the December 16, 1970 resolution ordered all older employee members of that class to retire permanently from work as of April 1, 1971 or be penalized by compelling them to return all pension funds received and to lose all future pension rights.

The uncontroverted facts in the record, briefly stated, are as follows:

After 20 years of work as a marine engineer, appellant of his own free will, elected to retire at age 45 in May 1964. Pursuant to the terms of the MEBA Pension Trust (respondents' Exhibit B and E, Article II and IIA) he executed a "Declaration of Retirement from Maritime Industry," (respondents' Exhibit C) wherein he clearly stated his intent to withdraw completely from employment and not to return to sea-going employment except upon the written permission from the Trustees.

Four years later, appellant sought permission to return to employment at age 49, and it was granted to meet the wartime emergency caused by the reactivating of laid-up vessels for strategical defense supplies for the United States Armed Forces in Vietnam in spite of a general decline in non-war connected maritime business.

In December 1970, the war needs for marine engineers no longer existed and to that effect a resolution reciting that factor was adopted by the Trustees revoking the consent granted to pensioners effective April 1, 1971.

At the Appeal Hearing, respondents American Maritime Association, MEBA Pension Trust and Mildred Killough, took the position that the Division lacked jurisdiction.

Thus, before going into the merits of the instant appeal, this Board must first dispose of the jurisdictional issues raised by the above-mentioned respondents.

With respect to respondent American Maritime Association, nowhere in the record could we find a scintilla of evidence as to proper service of the subject complaint on American Maritime Association. Neither did we find evidence to establish a waiver of the defense of lack of jurisdiction over American Maritime Association nor a general appearance on the merits which would warrant the inclusion of respondent American Maritime Association in the Determination and Order of the Division.

In the absence of said evidence, that error is fatal in that not only does it violate the statutory procedure prescribed in Section 297.2 but also is repugnant to due process of law.

Thus, as to respondent American Maritime Association the complaint should have been dismissed for lack of jurisdiction over respondent American Maritime Association.

With respect to the defense of lack of jurisdiction raised by respondents MEBA Pension Trust and Mildred Killough, Administrator, the record shows that respondent MEBA Pension Trust's sole function as it relates to appellant here, is to administer a pension fund and presumably, at no time it employed appellant in the discharge of that function.

However, even assuming without conceding that respondent Pension Trust and its administrator were appellant's employers, the fact remains that the pertinent section on age discrimination (296.3-a) applicable to the Pension System administered by respondents here was enacted after the inception of MEBA retirement system in 1955, and as a matter of law, the subject retirement system is exempted from coverage of the Human Rights Law.

Furthermore, there is nothing in the whole record to establish that the granting of the written permission to appellant here to return to work after retirement to meet a wartime emergency substantially modified or amended the existing retirement policy to the point where it might have resulted in a de novo retirement policy after the enactment of Section 296.3-a which in effect, then could have defeated the statutory exemption by bringing the new retirement system under the protection of the Human Rights Law.



Under those circumstances, it would certainly appear that the Division lacked jurisdiction over the subject matter and that the defense raised by said respondents is valid and with merit in that the retirement policy exemption contained in Section 296.3-a is applicable to the instant appeal and accordingly the complaint should have been dismissed as to respondents MEBA Pension Trust and Mildred Killough, Administrator.

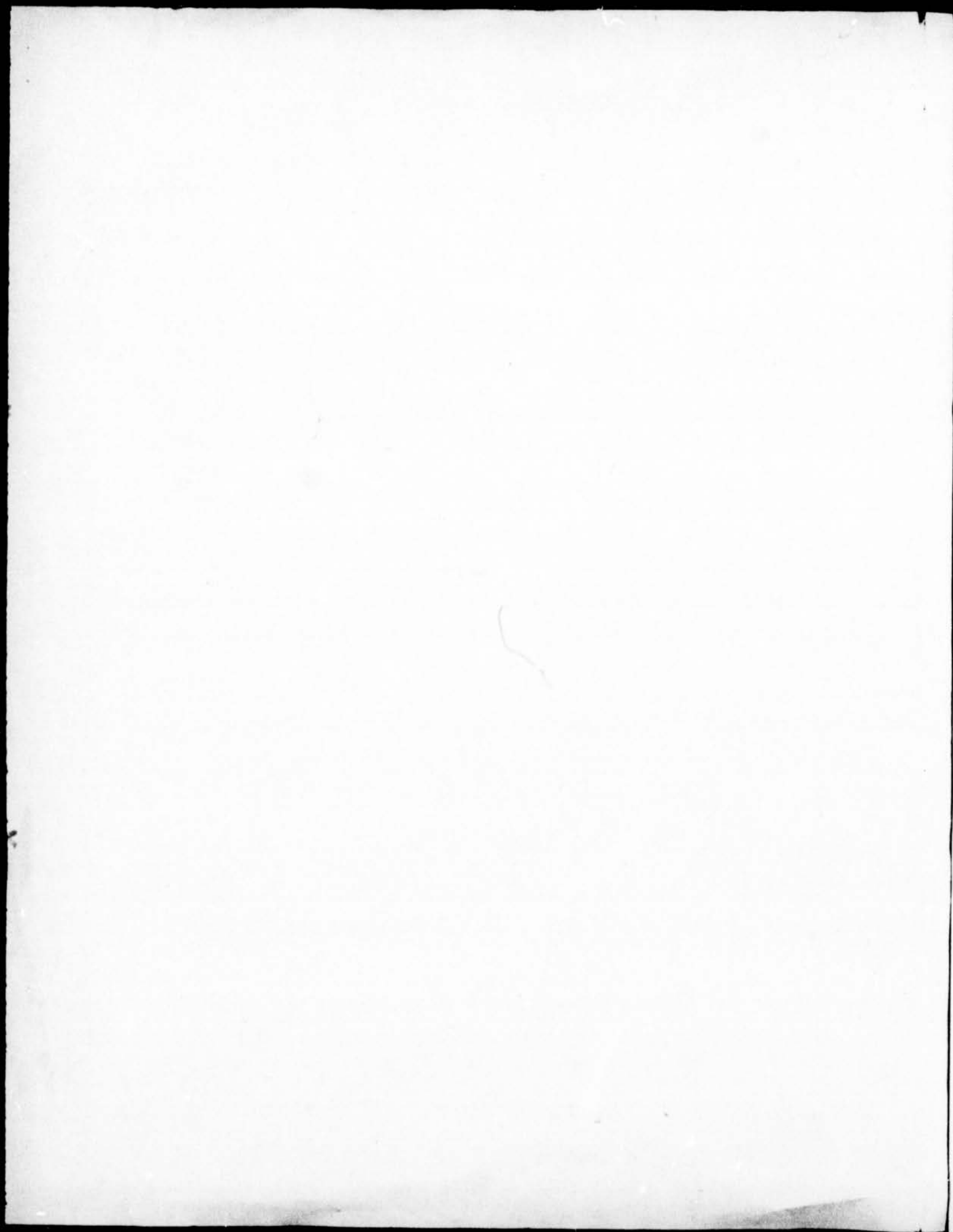
As to the merits of the instant appeal, appellant's contention that the December 1970 resolution is aimed at barring from future employment a class of older employees to make more jobs in a declining job market available to younger union members, would appear to be without merit in light of the uncontroverted fact that appellant here, who had retired at 45 years of age and collected \$300 per month was granted permission to return to work under a wartime emergency resolution four years later. The fact that at age 49 he was granted permission to return to work would appear to negate his allegations of unequal discriminatory treatment because of his age three years later.

Furthermore, there is not an iota of evidence in the whole record to warrant a valid inference that the December 1970 resolution was a sham to shield a policy against returning older union members to work or to deny union membership in light of the fact that the pension rights negotiated by respondent union and vested in appellant were available to all members of respondent union after 20 years of service - irrespective of age.

Neither does the evidence elicited by the Division would appear to warrant a finding that the resolution of December 1970 revoking the wartime emergency measure as it relates to appellant here was a subterfuge aimed at older members of respondent union who had retired in that said resolution was adopted and uniformly applied by respondent union to all expensioners who had returned to work - irrespective of age - under a wartime emergency beyond the control of respondent union.

Here, we could find no animus toward older union members nor corroborative evidence that would establish a systematic pattern of exclusion of older members by respondent union or discriminatory labor practices against older union members by affording privileged treatment to younger members at the "hiring hall" of respondent union.

The law is well settled that the New York State Human Rights Appeal Board is limited in its review powers. Accordingly, we are constrained to limit the instant appeal on the merits to the issue of discrimination as to age and nothing in this decision is intended to determine the rights of the parties on other issues, claims or other matters, that perhaps may exist between and among the parties.



Thus, upon close examination of the whole record before us, this Board must conclude that the subject complaint as to respondents American Maritime Association, MEBA Pension Trust and Mildred Killough should be dismissed for lack of jurisdiction and is hereby dismissed, and as to respondent National Marine Engineers Beneficial Association, the Order appealed from is not arbitrary or capricious, and accordingly, should be affirmed as modified herein.

Dated: December 20, 1971

STATE HUMAN RIGHTS APPEAL BOARD

Irma Vidal Santaella

Irma Vidal Santaella, Presiding Member

The following members concur in the foregoing decision and opinion:

HON. J. EDWARD CONWAY

HON. LLOYD L. HURST

HON. ALBERT S. PACETTA

Section 13. Retirement Defined. To be considered retired, an Employee must withdraw completely from any further employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement of the Association and any employment in the Association, Locals or Plans, but in no event shall these Regulations be construed to entitle an Employee to retire before age 55.

Section 14. Re-employment of Pensioners:

(A) A Pensioner may return to Covered Employment and subsequently retire again on a pension under this Plan without penalty except for the loss of pension payment during the period of re-employment, provided such Pensioner notifies the Trustees in writing and receives the permission of the Trustees prior to the date of his re-employment.

(B) A Pensioner who returns to Covered Employment, upon subsequent retirement, shall not be entitled to any higher benefit amount than that originally established, except in the case of an employee who received an early retirement pension. In such case the original monthly benefit amount will be paid until the excess of the total new monthly benefit amounts over the amounts

68-8

Exhibit B

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EXHIBIT

actually paid are equal to the total amounts previously paid to him as an early retirement pension, after which the new monthly benefit amount shall be paid.

(C) Penalty for Failure to Give Notice of Re-employment.

If a Pensioner returns to Employment forbidden by Section 13 without written permission from the Trustees, he shall be subject to the following penalties:

(1) He shall not be entitled to pension benefits for any month during which he was so employed and for six additional months;

(2) He shall be required to return pension amounts previously received and failing to do so, shall not be entitled to any further benefits; and

(3) The Trustees may, in their sole discretion, permanently disqualify him from any further benefits.

AMENDMENT NO. 17
TO THE
REGULATIONS OF THE M.E.B.A. PENSION TRUST

The regulations of the MEBA Pension Trust are hereby amended so that Section 13 of Article II shall read as follows:

"Section 13. Retirement defined. To be considered retired an employee must withdraw completely from any further employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement of the Association."

Adopted: September 12, 1962

Section 13. RETIREMENT DEFINED. To be considered retired an Employee must withdraw completely from any further employment aboard any vessel documented under the laws of the United States or any other country or aboard any vessel covered by any collective bargaining agreement of the Association and provided further the Employee has deposited with the Plan satisfactory documentary proof that he has withdrawn from membership in the Association and has surrendered his seaman's papers to the appropriate Government authority. Any Licensed Engineer who has retired shall, pursuant to Article IV, Section 4 herein, provide the same documentary proof that he has withdrawn from membership in the Association and has surrendered his seamen's papers to the appropriate Government authority.

When an Employee qualifies for and receives a pension based in part on credits derived from employment as a Port Engineer, Port Electrician or Hull Inspector, retirement shall preclude any future service thereafter in the American Flag or Foreign Flag Maritime Industry.

Provided, however, that continuing membership in the Association shall be permissible where the pensioner remains in employment covered by a collective bargaining agreement between the Association and an Employer which requires such membership as a condition of employment.

SECTION 14. RE-EMPLOYMENT OF PENSIONERS.

- (A) A Pensioner may return to Covered Employment and subsequently retire again on a pension under this Plan without penalty except for the loss of pension payment during the period of re-employment pro-

vided such Pensioner notifies the Trustees in writing and receives the permission of the Trustees prior to the date of his re-employment.

- (B) A Pensioner who returns to Covered Employment, upon subsequent retirement, shall not be entitled to any higher benefit amount than that originally established, except in the case of an Employee who received an Early Retirement Pension. In such case the original monthly benefit amount shall be paid until the excess of the total new monthly benefit amounts over the amounts actually paid are equal to the total amounts previously paid to him as an Early Retirement Pension, after which the new monthly benefit amount shall be paid. For the purpose of this paragraph, an Early Retirement Pension shall be deemed to include any pension given hereunder which was effective prior to the date that the pensioner comes within Covered Employment as a Port Engineer, Port Electrician or Hull Inspector.
- (C) Penalty for Failure to Give Notice of Re-Employment. If a Pensioner returns to Employment forbidden by Section 13 without written permission from the Trustees, he shall be subject to the following penalties:

(1) He shall not be entitled to pension benefits for any month during which he was so employed and for six additional months;

(2) He shall be required to return pension amounts previously received and failing to do so, shall not be entitled to any further benefits; and

(3) The Trustees may, in their sole discretion, permanently disqualify him for any further benefits.

(D) In the case of a Pensioner who is in Covered Employment as a Port Engineer, Port Electrician or Hull Inspector, he must exercise the option at the time he falls within said covered employment of either complying with Paragraph A above or continuing with his pension payments but accruing no further credits.

Section 15. CHANGE TO DISABILITY PENSION. A Pensioner shall be permitted to change his pension to a Disability Pension even though such disability commenced subsequent to his retirement date if he meets the requirements for such pension. This shall not apply to a pensioner who has retired on an Early Retirement Pension.

ARTICLE V
Amendment or Termination

Section 1. AMENDMENT. The Trustees may amend or modify these Regulations at any time in accordance with the MEBA Pension Trust and the Agreement and Declaration of Trust establishing the MEBA Pension and Welfare Plan, except that no amendment or modification may reduce any benefit rights which may have accrued prior to amendment, so long as funds are available for payment of such benefits.

Section 2. ACTUARIAL REVIEWS. These Regulations have been adopted by the Trustees on the basis of an actuarial estimate which has established that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that, in the future, the income and/or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make the payments provided for. Consequently, the Trustees shall have prepared, annually, an actuarial evaluation of the Fund.

Upon the basis of all the circumstances, the Board of Trustees may from time to time amend these Regulations including any change in benefit amount, types of benefits, and conditions of eligibility and payment, except that no amendment shall in any way reduce any pension rights established prior to amendment, so long as funds are available for payment of such benefits.

Joseph de Loraine
NAME

64 PEN1294

\$300.00

AMOUNT

5/1/64

EFFECTIVE DATE

DECLARATION OF RETIREMENT

FROM

MARITIME INDUSTRY

I, Joseph de Loraine, hereby certify that I have withdrawn and shall remain completely withdrawn during my retirement from any employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement with the Association and any employment in the Association Locals or Plans.

NOTE: PLEASE FILL IN THE DATE OF YOUR LAST EMPLOYMENT

1) ☒ Sailing Time 2) ☐ Night Relief
DATES: FEB 16, 1964

A return to employment as noted above, without written permission from the Trustees, shall be penalized in accordance with MEBA Pension Trust Regulations.

DATED: May 14, 1964

Exhibit E

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RECEIVED
MAY 14 1964
MEBA PLANS

RESOLUTION

by the
TRUSTEES
of the
MEBA PENSION TRUST

WHEREAS, the emergency need for Marine Engineers brought about by the Vietnam War no longer exists,

IT IS HEREBY RESOLVED by the Trustees that each permission heretofore granted by the Trustees to a pensioner to return to Covered Employment pursuant to Section 14 of Articles II and II-A of the Regulations shall be terminated effective April 1, 1971, or the termination date of any voyage on which he is then sailing, whichever is later, and it is further

RESOLVED, that the Administrator shall so advise each affected pensioner of this resolution.

ADOPTED: DECEMBER 16, 1970

Exhibit F

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M.E.B.A

Pension Trust

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

17 BATTERY PLACE • NEW YORK, N. Y. 10004 • WHITEHALL 4-6270

January 15, 1971

Mr. Joseph De Loraine
59 Verbena Drive
Comack, L. I., N. Y.

Re: 64-PEN-1294

Dear Mr. DeLoraine:

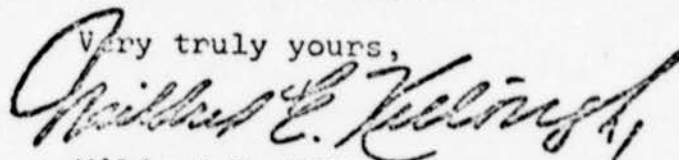
As you can see from the enclosed copy of the Resolution of the Trustees of the MEBA Pension Trust which was adopted on December 16, 1970, the permission by the Trustees heretofore granted you to return to covered employment has been terminated effective April 1, 1971 or the termination date of any voyage on which you are sailing and which is in progress on April 1, 1971, whichever is later.

You are free to resume pension status prior to April 1, 1971, if you so desire.

Please indicate below the date on which you desire to resume pension status and return the letter to us in the envelope enclosed. Also enclose your merchant mariner's document, the completed Declaration of Retirement form, and all Coast Guard discharges and pay vouchers covering employment on and after January 1, 1970. A copy of this letter is enclosed for your records.

Your date to resume pension status can be no earlier than the date following the last day you were employed as a Licensed Marine Engineer, which date must be in accordance with the condition set forth in the second paragraph of this letter.

Very truly yours,



Mildred E. Killough
Administrator

MEK:DK:lt
Enclosures

cc: National MEBA
District No. 1-PCD, MEBA,
MEBA Plan Office,



Exhibit G
National Marine Engineers Beneficial Association

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RESOLUTION
by the
TRUSTEES
of the
MEBA PENSION TRUST

WHEREAS, the emergency need for Marine Engineers brought about by the Vietnam War no longer exists,

IT IS HEREBY RESOLVED by the Trustees that each permission heretofore granted by the Trustees to a pensioner to return to Covered Employment pursuant to Section 14 of Articles II and II-A of the Regulations shall be terminated effective April 1, 1971, or the termination date of any voyage on which he is then sailing, whichever is later, and it is further

RESOLVED, that the Administrator shall so advise each affected pensioner of this resolution.

ADOPTED: DECEMBER 16, 1970

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DECLARATION OF RETIREMENT
FROM
MARITIME INDUSTRY

EFFECTIVE DATE
AMOUNT

I, hereby, certify that I have withdrawn and shall remain completely withdrawn during my retirement from any employment aboard any vessel documented under the laws of the United States or any other country or aboard any vessel covered by any collective bargaining agreement with the Association.

I understand that if I return to such employment without written permission of the Trustees, I will be subject to the penalty outlined in Article II, Section 14(c) of the MEBA Pension Trust Regulations.

I enclose herewith my U. S. Merchant Mariner's document in accordance with the Regulations of the MEBA Pension Trust. I further understand that after this document has been recorded in your office, it will be transmitted by you to the United States Coast Guard and that you will furnish me with a receipt for this document.

NOTE: PLEASE FILL IN THE DATE OF YOUR LAST EMPLOYMENT

DATE: 1) Sailing time _____

DATE: 2) Night relief _____

Signed _____

DATED _____

Pen 15

Rev. 4/71

A-52

S I R S:

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the complaint herein and the annexed affidavit of MILDRED E. KILLOUGH, sworn to December 12, 1972, the undersigned will move this Court before the Honorable Harold J. Tyler, Jr., at Room 1305, United States Courthouse at Foley Square, City, County and State of New York, on the 29th day of December, 1972, at 10:00 A.M., of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint as against defendants MEBA Pension Trust and Mildred E. Killough on the ground that the complaint fails to state a claim against said defendants upon which relief can be granted or, in the alternative, for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting said defendants summary judgment on the ground that there is no genuine issue as to any material fact and that said defendants are entitled to judgment as a matter of law.

Exhibit H

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The undersigned request oral argument.

Dated: New York, New York
December 13, 1972

Yours, etc.

PROSKAUER ROSE GOETZ & MENDELSON
Attorneys for Defendants
MEBA Pension Trust and
Mildred E. Killough
300 Park Avenue
New York, New York 10022
(212) 688-7300

TO:

E. JUDSON JENNINGS, ESQ.
Attorney for Plaintiff
2095 Broadway
New York, New York 10023

Defendants MEBA Pension Trust and Mildred E.

Killough contend that there is no genuine issue to be tried as to the following material facts:

1. On April 8, 1971, plaintiff commenced an action in the State Division of Human Rights alleging that defendants discriminated against him in violation of the Human Rights Law of the State of New York. On May 20, 1971, the State Division of Human Rights dismissed the complaint. On December 20, 1971, the State Human Rights Appeal Board issued its decision, affirming the decision of the State Division of Human Rights.

2. Plaintiff sent his notice of intent to sue, under the Age Discrimination In Employment Act of 1967, 29 U.S.C. §§621 et seq. ("the Act"), to the Secretary of Labor on July 19, 1972, more than 30 days after termination of State proceedings.

3. Defendant MEBA Pension Trust is not an employer, employment agency or labor organization within the meaning of the Act.

4. Defendant Mildred E. Killough is not an employer, employment agency or labor organization within the meaning of the Act.

5. The MEBA pension plan is a bona fide retirement plan within the meaning of the Act.

6. The Trustees' resolution of December 16, 1970, and revocation of permissions issued pursuant thereto did not discriminate with respect to age and was not a subterfuge to evade the purposes of the Act.

PROSKAUER ROSE GOETZ & MENDELSON
Attorneys for Defendants MEBA
Pension Trust and Mildred E.
Killough
300 Park Avenue
New York, New York 10022
(212) 688-7300

SIRS:

Notice of Cross-Motion
For Summary Judgment

PLEASE TAKE NOTICE that upon the complaint herein the affidavit of Mildred E. Killough, sworn to December 12, 1972, and the annexed affidavit of Joseph DeLoraine, sworn to January 9, 1973, the undersigned will move this Court before the Honorable Harold J. Tyler, Jr., at Room 1305, United States Courthouse at Foley Square, City, County, and State of New York, on January 19, 1973, at 2:15 P.M., for an order pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure, granting plaintiff partial summary judgment on the ground that there is no genuine issue as to the material facts establishing liability on the part of the defendants and that plaintiff is entitled to partial summary judgment as a matter of law.

Plaintiff requests oral argument.

Dated: January 9, 1973

Yours, etc.

E. Judson Jennings
Legal Services for the Elderly
Poor
2095 Broadway
New York, N.Y. 10023
Tel.: (212) 595-1340

TO: Proskauer Rose
Goetz and Mandersohn
Attorneys for Defendants
300 Park Avenue
New York, New York 10022
Tel.: 688-7300

State of New York)
) ss.:
County of New York)

Plaintiff's Affidavit Motion
to Dismiss Motions for
Summary Judgment

JOSEPH DeLOPAINE, being duly sworn, deposes and says:

1. I am the plaintiff herein. I make this affidavit in answer to the defendants' motion to dismiss and in regard to the cross-motions for summary judgment.

2. I have read the complaint herein, and I hereby swear to the truth of the allegations contained therein, and incorporate the allegations of the complaint into this affidavit by reference.

3. My profession is that of marine engineer. As such, I am required to be licensed by the United States Government. In order to work for an American employer, I must be a member in good standing of the Marine Engineers Benevolent Association. I have been engaged in this profession for more than twenty-five years. I am still fully capable of performing my duties as a marine engineer. Indeed, I believe that my experience and training make me particularly well qualified to do a better than average job at this position. My age at this time is 54.

4. In 1964, I had accumulated twenty years of pension credit with my union's pension plan. I was 46 years old at that time. The pension

regulations provided that I had a right to return to work as a marine engineer after notifying the trustees. In 1968, I exercised this right and returned to work. I collected pension benefits from 1964 to 1968. Of course, when I returned to work, my pension benefits stopped. The policy described was and is well known in the industry, and is generally called the "swinging door" policy.

5. In 1970, after I had been back at work for two years, the pension regulations were amended, to provide that my election to stop work temporarily in 1964 was permanent and binding, and further overruling and nullifying the decision in 1968 to permit me to return to full time active employment.

6. The regulations are technically promulgated by the board of trustees of the pension fund. However, eight of the members of this board are union representatives. The president of the union is the chairman of the board of trustees. I believe that the regulation amendment was proposed by the union for the sole purpose of discriminating against older workers like myself, forcing us into unwanted permanent retirement to permit the union to recruit new members who would pay high initiation and training fees to join the union.

7. I was then and now completely capable of performing my job. I stopped working in 1964 only because I knew I had the right to return to work. If I had not had that right, I would not have stopped working.

8. On January 15, 1971, I received an initial letter from Mildred Killough, the pension fund administrator, advising me of the new regulation and telling me somewhat cryptically that I was "free to

resume pension status prior to April 1, 1971, if you so desire." At that point, I became involved in a long and continued procedure with the union and the pension fund, whereby I questioned the validity of the regulation amendment and fought to remain in active employment without losing all of my pension rights. During the course of these negotiations and proceedings, I remained in active employment and continued to do my job in a completely competent manner.

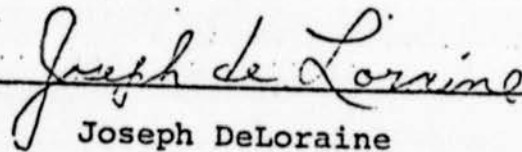
9. One course that I followed was a complaint to the New York State Human Rights Division. That agency ruled, on December 20, 1971, that, since the plan in question was put into effect before the effective date of the state law, the state lacked subject matter jurisdiction over my claim. (exhibit A hereto) Moreover, at the time that decision was made, I was still available for active employment and had not terminated my union membership.

10. In addition, I sought relief through the established union procedures by filing, on December 11, 1971, a demand that the union investigate the matter. On January , 1972, I was advised that the union would not act on my behalf.

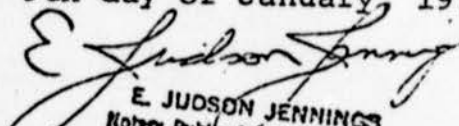
11. I finally assumed pension status under protest on or about February 15, 1972, by signing the necessary forms concerning pension benefits. I have still not accepted any pension benefits, in that I have not cashed pension checks sent to me.

12. On July 20, 1972, I filed with the Secretary of Labor a Notice of Intent to Sue, based on my claim that the defendants had discriminated against me and were continuing to discriminate against me in the operation of the pension plan. They have failed to offer me employment and continue to refuse to let me work as a marine engineer or at any job on any vessel whether documented American or foreign, although I am fully qualified and able to perform such work.

WHEREFORE, plaintiff respectfully prays this court to deny the defendants' motions to dismiss and for summary judgment, and further prays this court to grant the plaintiff's cross-motion for summary judgment as prayed for in the complaint, together with such other and further relief as may be just.


Joseph DeLorraine

Sworn to before me this
9th day of January, 1973


E. JUDSON JENNINGS
Notary Public, State of New York
No. 31-7082510
Qualified in New York County
Commission Expires March 30, 1974

Counter-Statement
Pursuant to General Rule 9(g)

Plaintiff submits the following counter-statement with regard to the material facts herein:

1. On December 23, 1971 the New York State Division of Human Rights determined that, since the retirement plan attacked had been established before the effective date of the state law, the agency lacked subject matter jurisdiction over the claim which is the basis for this action.
2. Plaintiff agrees that the notice to the Secretary of Labor was sent on July 19, 1972, and received July 20, 1972.
3. Plaintiff claims that the actions of the MEBA pension trust and its trustees and employees are within the meaning of 29 USC §§621 et seq. This, it is respectfully submitted, is at least partly a question of law. The practices herein complained of are alleged to have been proposed and promulgated by union officers. Further, for purposes of the Act, the actions and practices of the fund should be deemed those of the union and the employer. The improper benefit derived from the discriminatory resolution accrues to the union.

4. Defendant Killough is sued in her capacity as administrator of the plan and as such is the agent of an employer and a labor organization within the meaning of the Act.

5. The pension plan is a subterfuge to force older workers out of their jobs well before their normal retirement age, based upon discriminatory revocation of permission to retire and to return to work without prior notice. The motive for this practice is to "churn" the membership and increase the number of incoming members who must pay training and initiation fees to the union.

6. Plaintiff became retired on or after February 15, 1972.

7. Plaintiff has not accepted any benefit of the pension plan, and has not cashed any pension checks issued to him.

8. All of the plaintiff's actions in signing documents pertaining to his retirement were performed under duress and coercion, against the overt threat to completely terminate all pension rights in the event of his failure to cooperate.

9. The union and the pension trustees proceeded in bad faith to force plaintiff out of the union and out of the industry.

10. Plaintiff has been damaged and is entitled to compensatory and punitive damages, together with costs and a reasonable attorney's fee.

Dated: January 9, 1973

E. Judson Jennings
Legal Services for the Elderly Poor
Attorneys for the Plaintiff
2095 Broadway
New York, N.Y. 10023
Tel.: (212) 595-1340

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH DEBORGINE,

Plaintiff,

-against-

NEBA Pension Trust, representing
the National Marine Engineers'
Beneficial Association, and
Mildred Killough, individually
and in her capacity as Administrator
of the NEBA Pension Trust,

Defendants.

E. JUDSON JENNINGS, ESQ., Legal Services
for the Elderly Poor, New York City,
Attorney for Plaintiff.

PROSKAUER, ROSE, GOETZ & MENDELSON, ESQS.,
New York City, by Morton M. Manaker and
David A. Leff, Attorneys for Defendants.

TYLER, D.J.

Pleading that he is a marine engineer who wishes to
return to work, plaintiff has sued NEBA Pension Trust, alleged

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OPINION

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to represent workers of the National Marine Engineers' Beneficial Association, and its administrator, to recover compensatory and punitive damages. Based on his claims on The Age Discrimination in Employment Act of 1967, 29 U.S.C. §5621 et seq., plaintiff asserts that defendants in 1970, under regulations adopted by NEBA Pension Trust, improperly treated his decision to "temporarily" retire in 1964 as "permanent and binding". Defendants have moved for summary judgment on the grounds, inter alia, that this suit is time-barred as a matter of law, that neither defendant comes within the scope and sanctions of the 1967 statute and that as a matter of record plaintiff voluntarily and finally retired in 1964. Plaintiff has cross-moved for partial summary judgment on the issues of liability.

According to plaintiff, he is presently 54 years of age and fully qualified and fit to handle a position as a marine engineer. In 1964, he had accumulated twenty years of pension time under his union's pension plan. Thus, at age 46, he retired, and signed the following document.

DECLARATION OF RETIREMENT

FROM

MARITIME INDUSTRY

I, Joseph De Loraine, hereby certify that I have withdrawn and shall remain completely withdrawn during my retirement from any employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement with the Association and any employment in the Association Locals or Plans.

* * *

A return to employment as noted above, without written permission from the Trustees, shall be penalized in accordance with MEBA Pension Trust Regulations.

The relevant regulations provided in 1964, and so provide today, that, to be eligible for a pension, an employee must completely retire; return to employment without penalty is possible only if permission to do so is given by the Trustees. The regulations are silent, however, as to whether such permission may subsequently be withdrawn by the Trustees.

In 1968, with the permission of the Trustees of MEBA, plaintiff returned to work after having collected pension benefits since 1964. Upon return to work, his pension payments stopped. Then, in 1970, as plaintiff asserts, ...the pension

regulations were amended, to provide that re-election to stop work temporarily in 1964 was permanent and binding, and further overruling and nullifying the decision in 1968 to permit me to return to full-time active employment." More precisely, the Trustees passed a resolution in December of 1970, purporting to revoke the permission previously granted to all persons who had so requested to return to employment covered by the pension regulations.

After reciting these facts, plaintiff alleges that although the 1970 regulation changes were "technically promulgated by the board of trustees" of MEDA, eight of the board members were union representatives, one of whom, the union president, was and is the chairman of the board. Thus, in effect, plaintiff claims that the union rammed through the regulation changes in 1970 for the purpose of discriminating against "older workers" such as himself, although he names neither the union nor its representatives as defendants in this suit. Defendant Killough, as Administrator of the Trust, flatly denies that she or the Trust is the agent of any employer or employee organization, or that the regulations in 1970 were motivated as alleged.

The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq., prohibits discrimination because of age by employers, employment agencies, and labor organizations. Plaintiff, in his brief in opposition to defendants' motion for summary judgment herein, argues forcefully that the defendant pension trust is a labor organization, or at least has discriminated "acting by and with the union and its representatives" in the manner challenged. He asserts, moreover, that retirement plans are subject to the prohibitions of the act, citing Rodason v. American Hardware Mutual Insurance Co., 329 F. Supp. 223 (D. Minn. 1971).

The statutory language, which is reasonably clear, indicates that the pension trust in question is not a labor organization in this context. Section 630(d) reads:

"The term 'labor organization' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization." (underscoring added)

Neither party has been able to cite any cases applying this section to pension trusts. While pensions are undoubtedly considered a term of employment, it is difficult to understand how this pension trust has as its purpose "dealing with employers" in such matters -- the "dealing" indicating some negotiating or adversarial process.

More importantly, section 623(f) of the statute provides:

"It shall not be unlawful for an employer, employment agency, or labor organization --

(1) ...

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual...."

The Hodgson case, supra, relied upon by plaintiff, concerned an action brought by the Secretary of Labor, challenging an employer's policy of applying the terms of a voluntary retirement benefit plan, requiring retirement for females at 62 and males at 65, to all non-participating employees. It was this requirement that workers under 65 who were not participating should retire which was found to be invalid, since it violated the statute's mandate that

"[I]t shall be unlawful for an employer...to discharge any individual...because of such individual's age." The court went on to note that, "Retirement at age sixty-two for plan members is permitted only because it is pursuant to the Plan." 329 F. Supp. at 228. This was found to come within the exception of § 523(f)(2); on the other hand, the court upheld an interpretative bulletin promulgated by the Secretary of Labor, providing that "[t]his exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program."

This would seem to dispose of the action. Plaintiff has not persuasively argued that pension trusts fall within the prohibition of the Act; rather, the case he cites holds only that an employer may not utilize a retirement plan to prematurely retire non-participating employees. Even if the defendant pension trust here were to be considered a labor organization, which I think most unlikely, the exception to the statute is still clearly applicable. Plaintiff has made no factual showing that the Trustees were acting as agents of the union in passing the resolution in 1970 revoking his permission to return to work. He asserts only that "I believe

that the regulation amendment was proposed by the union for the sole purpose of discriminating against older workers like myself, forcing us into unwanted permanent retirement to permit the union to recruit new members who would pay high initiation and training fees to join the union." Affidavit of plaintiff, verified on the 9th of January, 1973, at p. 2. Moreover, it is difficult to understand how the eight union members on the board of trustees would be so motivated to "discriminate" in such a fashion against their co-workers.

Plaintiff's mere conclusory allegations of union control and discrimination cannot suffice to withstand defendant's motion for summary judgment. More than a difference of opinion, must be demonstrated: "the rule requires that the opposing party present some evidence which supports the bald assertion that there is a dispute." Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1972). Accordingly, it is not necessary to reach the other issues posited by defendants' motion, which is hereby granted for the reasons stated above. Plaintiff's cross motion is denied. Let judgment be entered dismissing the action. It is so ordered.

Dated: February 21, 1973

J. R. Tyler, Jr.
U.S.D.J.

United States District Court
Southern District of New York

Joseph De Lorainne

Plaintiff

-against-

72 C I V 4427 HRT

MEBA Pension Trust, represent-
ing the National Marine Engin-
eers Beneficial Association;
and Mildred E. Killough, indi-
vidually and in her capacity as
Administrator of the MEBA Pen-
sion Trust,

Judgment

Defendants

Ordered that the defendants MEBA Pension Trust, representing the National Marine Engineers Beneficial Association and Mildred Killough, individually and in her capacity as Administrator of the MEBA Pension Trust have judgment against the plaintiff Joseph DeLorraine, dismissing the complaint.

Harold R. Tyler

United States District Judge

Enter: February 26, 1973

A-72

S I R S:

: NOTICE OF MOTION TO
: ALTER OR AMEND A JUDGMENT
: AND FOR LEAVE TO SERVE
: AND FILE AN AMENDED COM-
: PLAINT

PLEASE TAKE NOTICE that upon the affidavit of E. JUDSON JENNINGS, sworn to March 5, 1973 and upon all of the pleadings, papers, and proceedings herein, the plaintiff will move this Court before the Honorable Harold J. Tyler, Jr., at Room 1305, United States Courthouse at Foley Square, City, County and State of New York, on March 16, 1973 at 2:15 PM, for an order pursuant to Rules 15 and 59 of the Federal Rules of Civil Procedure, altering and amending the decision and judgment entered herein and granting the plaintiff leave to file the annexed Amended Complaint upon the defendants Marine MEBA Pension Trust and the National Marine Engineers' Beneficial Association, on the ground that justice so requires.

Plaintiff requests oral argument.

Dated: March 5, 1973

Yours, etc.
E. Judson Jennings
Legal Services for the
Elderly Poor
2095 Broadway, Rm. 304
New York, N.Y. 10023
Tel.: (212) 595-1340
Attorneys for Plaintiff

TO: Proskauer Rose
Goetz and Mendersohn
Attorneys for Defendants
300 Park Avenue
New York, New York 10022
Tel.: (212) 688-7300

A-73

E. JUDSON JENNINGS, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff herein.

2. On February 6, 1973, this Court entered a judgment granting the defendant's Motion to Dismiss the Complaint or for Summary Judgment. Plaintiff had alleged that the action of the MEBA Pension Trust in unilaterally revoking its "swinging door" policy was motivated in fact by an intention to violate the Age Discrimination and Employment Act, 29 U.S.C. 621 ff. Plaintiff seeks leave to file the annexed amended complaint which alleges in addition that the union of the National Marine Engineers' Beneficial Association has acted directly and indirectly through the MEBA Pension Trust to violate the purposes of the act, and adds several claims for relief not previously expressly set forth.

3. Further, plaintiff seeks to amend his complaint to allege that the MEBA Pension Trust, acting for and together with the National Marine Engineers' Beneficial Association, acted in a manner that was contrary to the best interests of its employees in revoking the "swinging door" policy and therefore acted in violation of the Taft-Hartley provision regarding Pension-Trust Funds, 29 U.S.C. §186 (§§C)(5).

4. Plaintiff commenced this action against the MEBA Pension Trust "representing the National Marine Engineers' Beneficial Association." This Court has determined, based upon the affidavit of Mildred Killough, Administrator of the MEBA Pension Trust, that the MEBA Pension Trust is not such a representative. It is not denied that half of the pension trustees are representatives of the union or that the President of the

National Marine Engineers' Beneficial Association is also the Chairman of the Board of Trustees of the MEBA Pension Trust. Plaintiff submits that the interests of justice would best be served by permitting plaintiff to amend his complaint to make the union a separate and independent defendant. In addition, as argued more fully in the plaintiff's Memorandum of Law, the actions complained of also violate the Taft-Hartley Act because they are arbitrary and capricious and contrary to the interest of the beneficiaries of the pension trust.

5. Plaintiff alleged six claims for relief in the original complaint. The defendant's motion and the Court's decision are largely devoted to a discussion of the first claim for relief which is based upon the Age Discrimination in Employment Act. Plaintiff respectfully submits that in the event that this Court denies this motion that the proper judgment is one dismissing this action for lack of Federal jurisdiction rather than summary judgment which may be taken as an adjudication upon the merits of all of plaintiff's claims.

6. No prior application has been made for the relief requested herein.

WHEREFORE, plaintiff respectfully prays this Court for an order granting relief to serve and file the amended Complaint together with such other and further relief as may be just.

E. Judson Jennings

Sworn to before me
this 5th day of March, 1973

Notary Public

A-75

State of New York)
) ss.:
County of New York)

AFFIDAVIT

72 CIV. 4427 HRT

JOSEPH de LORAINÉ being duly sworn deposes and says:

1. I am the Plaintiff herein. I make this affidavit to supplement the facts before this Court in its' consideration of the pleadings and other matters in this case.

2. Plaintiff has alleged that the defendant MEBA Pension Trust acted as the agent of Defendant MEBA in passing the 1970 resolution revoking permission to return to work (Amended Complaint p. 14; Complaint p.4). The amendment of the Pension Trust regulations was made pursuant to a general resolution passed by the National MEBA and by District 1, of the National MEBA. Upon information and belief the documents supporting this allegation are readily available and are in the records of the Defendant MEBA.

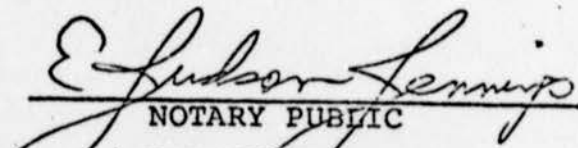
herein, by deliver a true copy thereof to h personally. Deponent knew the
d to be the person mentioned and described in said papers as the therein.
me, this day of 19

A-76

3. Plaintiff also wishes to amplify the statement in paragraph 31 regarding the effect of the 1970 resolution upon him. At the time the resolution was passed, the plaintiff had taken a full-time permanent position aboard the SS Jacksonville after waiting six months for a job to become available. The effect of the resolution was to cause him to lose a job for which he was duly qualified and which he had expended a great deal of effort to obtain.


JOSEPH DE LORAINÉ

Sworn to before me
this 8th day of March, 1973


NOTARY PUBLIC
E. HUDSON JENNINGS
Notary Public, State of New York
No. 1-7082310
Qualified in New York County
Commission Expires March 20, 1975

A-77

STATE OF NEW YORK, COUNTY OF

§§:

INDIVIDUAL VERIFICATION

deponent is the
read the foregoing
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.
Sworn to before me, this day of 19

, being duly sworn, deposes and says that in the within action; that deponent has and knows the contents thereof; that

STATE OF NEW YORK, COUNTY OF

§§:

CORPORATE VERIFICATION

of
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

, being duly sworn, deposes and says that deponent is the the corporation

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF New York

§§:

AFFIDAVIT OF SERVICE BY MAIL

E. Judson Jennings
being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at
2095 Broadway, New York City
That on the 8th day of March 1973 deponent served the within Affidavit
upon Proskauer, Rose, Goetz & Mendelsohn attorney(s) for
Defendant in this action, at 300 Park Avenue, New York City
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in ~~the post office~~ official
depository under the exclusive care and custody of the United States post office department within the State of New York.
Sworn to before me, this 10th day of April 19 73

Jonathan A. Weiss
JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4257275
Qualified in New York County
Commission Expires March 30, 1975

STATE OF NEW YORK, COUNTY OF

§§:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at
That on the day of 19 at No.
deponent served the within
upon
the herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

- - - - - x

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the proposed amended complaint herein, the undersigned will move this Court before the Honorable Harold J. Tyler, Jr., at Room 1305, United States Courthouse at Foley Square, City, County and State of New York, on the 6th day of April, 1973, at 10:00 A.M. of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint as against defendants MEBA Pension Trust and Mildred E. Killough on the ground that the proposed amended complaint fails to state a claim against said defendants upon which relief can be granted.

Dated: New York, New York
April 3, 1973

PROSKAUER ROSE GOETZ & MENDELSON

By Morton M. Mencher

Attorneys for Defendants
MEBA Pension Trust and
Mildred E. Killough
300 Park Avenue
New York, New York 10022
(212) 688-7300

TO:

E. JUDSON JENNINS, ESQ.
Attorney for Plaintiff
2095 Broadway
New York, New York 10023

15

A-79

STATE OF NEW YORK }
COUNTY OF NEW YORK)

ss.:

72 CIV. 4427

Leon Shapiro being duly sworn deposes and says:

1. I am a Trustee of the MEBA Pension Trust and have also been elected as Secretary-Treasurer of District 1-Pacific Coast District, MEBA.

2. The Board of Trustees is comprised of an equal number of union designated Trustees and employer designated Trustees.

3. Any action taken by the Board of Trustees must be by majority vote of the Trustees.

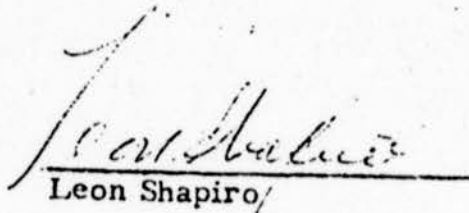
4. The MEBA Pension Trust is not an agent of MEBA or any employer or employer association under contract with MEBA, but rather an independent entity whose assets are administered by the Trustees and their employees in accordance with the rules and regulations of the MEBA Pension Trust.

5. I have read the affidavit of the plaintiff in this matter, sworn to the 8th day of March, 1973 and have noted the allegation of the plaintiff that, "The amendment of the Pension Trust regulations was made pursuant to a general resolution passed by the National MEBA and by District 1, of the National MEBA."

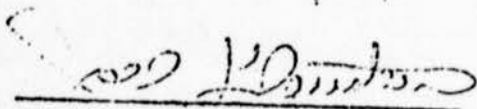
In my capacity of Secretary-Treasurer of District 1, Pacific Coast District, MEBA I am required to maintain the files and records of the District.

I have reviewed the files and records of the District and find no general resolution passed by District No. 1, MEBA in 1970, 1969 or 1971 which pertains to revocation of permission to return to work.

6. The revocation of permission to return to work adopted by the Trustees of the MEBA Pension Trust in 1970 was solely the result of action taken by the Trustees of their own volition.


Leon Shapiro

Sworn to before me
this 3rd day of April, 1973



JOE GEANSTEIN
Notary Public, State of New York
No. 30-1247425
Qualified in Nassau County
Residence - Nassau County
Commission Expires March 30, 1975

STATE OF CALIFORNIA) ss.:
COUNTY OF SAN FRANCISCO)
Charles Black being duly sworn deposes and says:

72 CIV. 4427

1. I am a Trustee of the MEBA Pension Trust and have also been elected as Secretary-Treasurer of National Marine Engineers' Beneficial Association.

2. The Board of Trustees is comprised of an equal number of union designated Trustees and employer designated Trustees.

3. Any action taken by the Board of Trustees must be by majority vote of the Trustees.

4. The MEBA Pension Trust is not an agent of MEBA or any employer or employer association under contract with MEBA, but rather an independent entity whose assets are administered by the Trustees and their employees in accordance with the rules and regulations of the MEBA Pension Trust.

5. I have read the affidavit of the plaintiff in this matter, sworn to the 8th day of March, 1973 and have noted the allegation of the plaintiff that, "The amendment of the Pension Trust regulations was made pursuant to a general resolution passed by the National MEBA and by District 1, of the National MEBA."

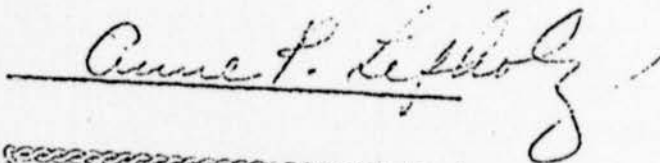
In my capacity of Secretary-Treasurer of National MEBA I am required to maintain the files and records of the National Marine Engineers' Beneficial Association.

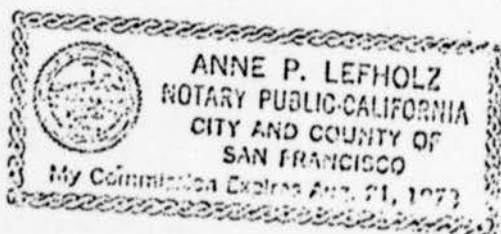
I have reviewed the files and records of the National Marine Engineers' Beneficial Association and find no general resolution passed by National MEBA in 1970, 1969 or 1971 which pertains to revocation of permission to return to work.

6. The revocation of permission to return to work adopted by the Trustees of the MEBA Pension Trust in 1970 was solely the result of action taken by the Trustees of their own volition.


Charles Black

Sworn to before me
this 17th day of April, 1973.





STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

AFFIDAVIT

72 CIV. 4427 HRT

E. JUDSON JENNINGS, being duly sworn, deposes and says:

I am the attorney for the plaintiff. I have recently received a letter purportedly written by the president of the Marine Engineers Beneficial Association to a member of that union who was applying for permission to be reinstated into the union. It is the plaintiff's intention to conduct pre-trial discovery, including the deposition of Mr. Calhoon, for the purpose of obtaining proof that this letter was in fact written by him. A typescript of the letter is attached hereto as Exhibit A.

As appears from this letter, Mr. Calhoon admits that the pension fund is attempting to get new men into the union with the hope that they will not work long enough to receive any pension rights, but will be more interested in job opportunities and present wages. This clearly evidences a failure of the pension trustees to operate the plan for the sole benefit of the employees and their families as required by §302(c)(5) of the Taft-Hartley Act.

Sworn to before me this
27th day of April, 1973.


E. JUDSON JENNINGS

August 18th, 1969

Mr Edward C.O'Brien

Dear Sir & Brother:

This will reply to your letter of August 12th 1969, concerning your request for reinstatement to full membership. I am afraid such reinstatement is not possible. The financial structure of the IBEA Pension Plan is based on actuarial studies of mortality rates and contributions from the companies. The members now on pensions have not had contributions made for them anywhere near the value of the pension they have been collecting.

The new men coming into the industry will be paying off the pension benefits those on pension and those going on pension in the next five or ten years. These young men are not thinking of pensions-job opportunities are more important to them. Under no circumstances would I recommend the reinstatement of any pensioner and if such an issue was raised with the Trustees, I would vote against it.

For many years we have had grievance machinery set up to settle beefs-and distrust over beefs with members is certainly not a legitimate reason for going on pension.

Frate nally Yours

J.M. Calhoun

President

A-85

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DIST. CT. S.D.N.Y.
JUL 8 12 27 PM '73
CLERK

JOSEPH BALORIANI,

Plaintiff,

-against-

NMBA Pension Trust, representing the
National Marine Engineers' Beneficial
Association; and Mildred Millough,
individually and in her capacity as
Administrator of the NMBA Pension Trust,

Defendants.

MEMORANDUM

72 Civ. 4427 JMT

#37538

TYLER, D.J.

By way of opinion filed February 21, 1973, this court granted defendants' motion for summary judgment, and ordered the above-captioned action dismissed. On March 8, 1973, plaintiff filed a "notice of motion to alter or amend a judgment and for leave to serve and file an amended complaint"; on March 27, plaintiff filed a notice of appeal from the order of dismissal, having in the interim secured an adjournment of his pending motion. In addition to opposing the motion,

defendants have cross-moved to dismiss the amended complaint, pursuant to Rule 12(b)(6), F.R.Civ.P., in the event that it is granted.

Plaintiff's motion is made pursuant to Rules 15 and 59, F.R.Civ.P., "on the ground that justice so requires." As the caption to plaintiff's supporting memorandum indicates, the motion seeks to vacate the judgment, rather than to alter it, so that an amended complaint can be filed. Defendants contend that the motion raises no new issues of fact, and plaintiff does not seriously contest the judgment dismissing the original complaint. Rather, the motion is seemingly grounded on the merits of the amended complaint, which adds the Marine Engineers' Beneficial Association (the Union) as a party defendant, and "contains an expanded and more detailed statement of several theories of action under federal and state law." Memorandum of plaintiff in support of motion, at p. 2. Parenthetically, it should be noted that the proposed amended complaint does not include in its caption the Union as a defendant, but I regard this as no more than an oversight or inadvertence.

At the threshold, defendants contend that this court is without jurisdiction to entertain plaintiff's motion because of a pending appeal. This contention is without merit, since

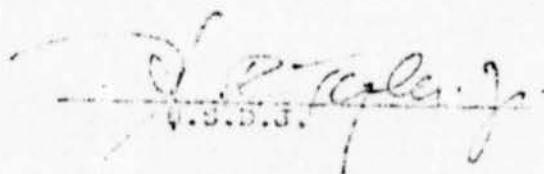
"[a] motion to alter or amend a judgment under Rule 59(a) that is served not later than 10 days after entry of judgment destroys the finality of the judgment for purposes of appeal." 6A Moore's Federal Practice ¶59.13[4] at 3837 (2d ed. 1972). Plaintiff has emphasized, moreover, that his appeal is merely precautionary. And as Judge Gurfain has recently ruled, "[t]he precautionary filing of an appeal by the plaintiff does not divest this court of jurisdiction." Sampson v. Ampex Corporation, 335 F.Supp. 242, 246 (S.D.N.Y. 1971), aff'd 463 F.2d 1042 (2d Cir. 1972).

The amended complaint seeks to remedy the defects found by the undersigned to inhere in the original complaint. I am inclined to grant the motion to vacate the judgment and to permit the amended complaint, if for no other reasons than because defendants would not be greatly prejudiced and because the jurisdictional defects noted in this court's previous opinion might conceivably be cured. Such relief is placed firmly within the discretion of this court to grant. 6A Moore's Federal Practice, supra, ¶59.12[1] at 3878-9. And Rule 15(b) directs that leave to amend "shall be freely given when justice so requires."

Although there is mixed authority for refusing leave to amend a complaint which is jurisdictionally defective even after the proposed amendment, 3 Moore's Federal Practice, §15.02 at 902-906 (2d ed. 1972), defendants do not raise the issue. And I believe the wiser course is to vacate judgment, grant leave to amend, and then consider defendants' motion to dismiss. Since plaintiff has submitted an additional two page affidavit, and material outside the pleadings had been previously submitted, defendants' current motion to dismiss under Rule 12(b)(6) shall be treated as one for summary judgment pursuant to Rule 56, F.R.Civ.P. The parties shall have 14 days from the filing of this memorandum to tender whatever other submissions they care to in respect to the summary judgment motion.

It is so ordered.

Dated: June 5, 1973


J. P. Rogers, Jr.
U.S.D.J.

June 22 1973

AMENDED COMPLAINT 72 CIV 4427 HRT

I.

PRELIMINARY STATEMENT

This is an action for a declaratory judgment, injunctive relief, and damages for Defendants' improper and unlawful actions against the Plaintiff in depriving him of his right to work in the maritime industry in violation of Federal laws against age discrimination, as well as the Constitution and By-Laws of the National Marine Engineers' Beneficial Association [hereinafter MEBA].

II.

JURISDICTION

1. Plaintiff is a citizen and resident of the State of New York.

2. This action arises under §§623 (f) (2) and 623 (c) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et. seq.; under §§7 and 8 of the National Labor Relations Act, 29 U.S.C. §§157 and 158 (b) (1) (a); and under §302(c) (5) of the Taft-Hartley Act, 29 U.S.C. §186(c) (5).

3. Jurisdiction is also conferred on this Court by 29 U.S.C. §626 and 28 U.S.C. §1331. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

4. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relates to declaratory judgments and remedies, and Rule 65 of the Federal Rules of

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Civil Procedure, relating to injunctions.

III.

PLAINTIFF

5. Plaintiff is a marine engineer. He has been a member of Defendant union for over 30 years and is a participant in the Defendant MEBA Pension Trust Plan.

IV.

DEFENDANTS

6. The Defendant Marine Engineers' Beneficial Association is a national labor union and labor organization of which Plaintiff has been a member during his career as a marine engineer.

7. The Defendant MEBA Pension Trust is the Marine Engineers' Beneficial Association Pension Trust Fund of the National Marine Engineers' Beneficial Association.

8. Mildred E. Killough is Administrator of the MEBA Pension Trust and is responsible for its administration.

V.

STATEMENT OF FACTS

9. Plaintiff is a marine engineer. As such, he must be licensed by the United States government and be a member of the Defendant Union in order to practice his trade. He has been a member in good standing of the National Marine Engineers' Beneficial Association [hereinafter MEBA] and of the pension trust [hereinafter MEBA Pension Trust] created by said union for more than thirty years.

10. The MEBA Pension Trust is a retirement plan

financed by employer contribution pursuant to a collective bargaining agreement. It is subject to the requirement of §302 of the Taft-Hartley Act, 29 U.S.C. §186(c)(5). It is operated by a board of trustees composed of one-half management representatives and one-half labor representatives. The President of MEBA is also the Chairman of the MEBA Pension Trust. The Trust is required by federal law to be established "for the sole and exclusive benefit of the employees of (the) employer, and their families and dependents..." 29 U.S.C. §186(c)(5).

11. In 1964, Plaintiff had accumulated twenty years of pension credit. He was 46 years of age. He elected to receive pension benefits from the MEBA Pension Trust under the "swinging door" policy then in effect.

The "swinging door" policy permitted members to receive pension benefits for a period of time and then return to full-time work, provided only that they did not finally retire and had continued to be "available for work" during the time benefits were being drawn. The "available for work" requirement could be met either by regular registration for work or by continuance of membership in the union. MEBA Pension Trust Regulations, Article III, §5(A).

12. Solely in reliance upon the "swinging door" policy, the Plaintiff elected to temporarily cease working and to draw pension benefits. Far from retiring, he meticulously preserved his union membership and thus his "availability for work." This distinction was expressly recognized in MEBA Pension Trust Regulations, Article II, §13, which provides:

"Section 13. RETIREMENT DEFINED. To be considered retired an Employee must withdraw completely from any further

employment aboard any vessel documented under the laws of the United States or any other country or aboard any vessel covered by any collective bargaining agreement of the Association and provided further the Employee has deposited with the Plan satisfactory documentary proof that he has withdrawn from membership in the Association and has surrendered his seaman's papers to the appropriate Government authority."

13. From 1964 to 1968, Plaintiff maintained his position by retaining union membership. In 1968, he exercised his right to return to work, as provided for in Article II, §14 of the Regulations:

"Section 14. RE-EMPLOYMENT OF PENSIONERS.
(A) A Pensioner may return to Covered Employment and subsequently retire again on a pension under this Plan without penalty except for the loss of pension payment during the period of re-employment provided such Pensioner notifies the Trustees in writing and receives the permission of the Trustees prior to the date of his re-employment."

.....

14. Plaintiff relied upon the Regulations in effect when he stopped working in 1964, when he paid union dues from 1964 to 1968, and when he returned to work in 1968. None of the Defendants in any way negatived his understanding. In 1970, without notice, the trustees of the Defendant MEBA Pension Trust adopted a resolution cancelling permission to return to work. This had the effect of making Plaintiff's temporary cessation of employment in 1964 a binding permanent act of retirement. The resolution also required all workers in Plaintiff's class to surrender their merchant mariner's document sign a declaration of retirement, and withdraw from MEBA union

membership.

15. On February 11, 1972, Plaintiff was placed in retirement pursuant to the resolution.

16. The National MEBA, with the American Maritime Association and other employers, has for several years been giving assistance and is now giving active assistance to younger persons in obtaining employment aboard vessels in preference to older persons by operating a training school for persons desiring to become marine engineers. While these younger persons remain students at the training school, and upon their graduation, they are discriminatorily assisted in finding employment aboard vessels in preference to older marine engineers, the same being accomplished through discriminatory operation of a joint employer-union hiring hall. Moreover, the MEBA receives an initiation fee of one thousand dollars for each new member.

17. The motive and intent of Defendants in passing and applying the 1970 resolution was and is to prematurely retire workers of Plaintiff's class in order to facilitate the recruitment of new workers for the profit of the Defendants.

18. As a result of these unlawful actions, Plaintiff has been unable to accept employment in his profession, has worked for low salaries or not at all, and has had his reputation damaged. He has lost the benefits of union membership. He has suffered damages in the amount of \$50,000.00.

19. This matter is not within the jurisdiction of the New York State Human Rights Division, as per the decision of that agency rendered December 23, 1971.

20. Plaintiff has exhausted his administrative remedies under the Age Discrimination in Employment Act of 1967, 29 U.S.C.

§621 et. seq. On July 19, 1972, a notice of intent to sue was sent to the Secretary of Labor. More than sixty days has elapsed since said notification was sent.

VI.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

21. The course of conduct of Defendants violates the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et. seq. Section 623(c) of the Act provides in part:

"(c) It shall be unlawful for a labor organization... (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age; (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

Section 623(f) of the Act provides:

"It shall not be unlawful for an employer, employment agency, or labor organization-***
(2) To observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act..."
[Emphasis supplied.]

22. The Defendant MEBA is a labor organization, subject to the Age Discrimination in Employment Act of 1967. The Defendant MEBA Pension Trust is operated by a board of trustees composed of one-half union representatives. The Defendant MEBA

Pension Trust, in passing the 1970 resolution described in Paragraph 14, supra, acted to implement the policies and desires of the union, in violation of its common law trust duties and of the fiduciary obligation imposed by §302 of the Taft-Hartley Act, 29 U.S.C. §186(c)(5).

It acted as the agent of the labor organization and thus became subject to the provisions of the Age Discrimination in Employment Act of 1967. In the alternative, the MEBA Pension Trust is a labor organization for purposes of the Act, as defined in 29 U.S.C. §630.

23. The actions of both Defendants acting in concert in passing the 1970 resolution calling for resignation from the union and surrender of merchant mariner's papers constituted an attempt to circumvent the purposes of the Act by imposing a retroactive mandatory retirement upon Plaintiff based upon a decision to leave work temporarily under existing regulations and practices. This scheme is not in furtherance of the interests of older employees, but is rather an attempt to force them out prematurely in order to make room for young newcomers who pay high initiation fees.

SECOND CLAIM FOR RELIEF

24. Both the Defendant MEBA and the MEBA Pension Trust are labor organizations for purposes of §§7 and 8 of the National Labor Relations Act, 29 U.S.C. §§157 and 158. Local No. 2 v. Paramount Plastering Co., 310 F.2d 179 (9th Cir., 1962) cert. den. 372 U.S. 944 (1963). Defendants have coerced Plaintiff into resigning from the Defendant MEBA in violation of §§7 and 8 of the Act. See Progressive Mine Workers v. NLRB, 422 F.2d 538 (7th Cir., 1970).

THIRD CLAIM FOR RELIEF

25. Plaintiff stopped working in 1964 under a system which permitted him to return to work upon election. In 1968, he exercised his right to return to work. In 1970, a resolution was passed which had the effect of making Plaintiff's 1964 decision to stop working a binding election to retire permanently from his profession, at the age of 46. The action of MEBA Pension Trust in passing and applying the 1970 resolution to Plaintiff constituted a breach of the pension agreement between Plaintiff and Defendants.

FOURTH CLAIM FOR RELIEF

26. The actions of Defendants in 1970, taken after Plaintiff's open and reasonable reliance upon Defendants' earlier "swinging door" policy, are unlawful under the doctrines of ordinary estoppel and promissory estoppel, and therefore cannot be enforced against the Plaintiff.

FIFTH CLAIM FOR RELIEF

27. The Defendant MEBA Trust, in passing the 1970 resolution described in Paragraph 14, supra, acted arbitrarily and capriciously and breached the duty imposed upon it by §302 of the Taft-Hartley Act, 29 U.S.C. §186(c)(5). Insley v. Joyce, 330 F. Supp. 1228, 1283 (N.D. Ill., 1971); Roark v. Boyle, 439 F.2d 497 (D.C. Cir., 1970); Collins v. UMW, 298 F. Supp. 964 (D. D.C. 1969) aff'd 439 F. 2d 494 (D.C. Cir., 1970). The interpretation and application of this standard is a question of federal common law and is properly to be done by the federal courts. Lewis v. Benedict Coal, 361 U.S. 459 (1960); Textile

Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

SIXTH CLAIM FOR RELIEF

28. The Defendant MEBA Pension Trust has breached its fiduciary duties to the Plaintiff according to the traditional common law of trusts.

SEVENTH CLAIM FOR RELIEF

29. Article 6, §6(b)(1) of the 1970 Constitution of the National Marine Engineers' Beneficial Association assures full and equal rights among the membership within Pension Plans. Prior to the Defendants' demand that Plaintiff submit his Merchant Mariner's License, Plaintiff satisfied the eligibility requirements for membership in the National MEBA as set forth in Article 3, §1(c) of the National Constitution. See Appendix A. Prior to the involuntary termination of his membership in December, 1971, Plaintiff had met all of the requirements for membership in good standing as set forth in Article 13 of the National MEBA Constitution and in Article 7 of the Constitution for Districts. See Appendix B. Prior to the involuntary termination of his membership in the MEBA, Plaintiff's membership status was in accordance with the provisions in Article 20, §8 of the By-Laws of District No. I, MEBA. See Appendix C. The Defendants' demand upon Plaintiff that he retire from Marine Engineering and resign from the MEBA constituted a clear violation of the Constitutions of the National and District Associations and of the By-Laws of District No. I, MEBA.

EIGHTH CLAIM FOR RELIEF

30. Plaintiff is subject to Article II of the MEBA Pension Trust Regulations, rather than to Article II-A, since his pension became effective prior to June 16, 1968. Plaintiff was not in retirement as defined in Article II, §13 of the MEBA Pension Trust Regulations at any time prior to 1971. Plaintiff's actions prior to December, 1971 were in compliance with Article II, §14 of the MEBA Pension Trust Regulations.

31. Article II, §14 of the MEBA Pension Trust Regulations, which provides for the Re-Employment of Pensioners, contains no language which limits or conditions said re-employment except for the loss of pension payment during the period of re-employment. Defendants' revocation of permission to Plaintiff to return to work was a clear violation of the MEBA Pension Trust Regulations, and said revocation was to the substantial detriment of the Plaintiff.

NINTH CLAIM FOR RELIEF

32. The actions of both the MEBA and the MEBA Pension Trust in forcing Plaintiff to resign from his chosen profession and to surrender his merchant mariner's document were unlawful and denied him his right to engage in his profession.

VII.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Honorable Court:

1. Assume jurisdiction of this cause and set this

case down promptly for a hearing.

2. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57 and 58 declaring that the revocation of the permission to return to work and refusal of continued re-employment to Plaintiff JOSEPH de LORAINÉ was and is unlawful.

3. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57 and 58 declaring that the revocation of the permission for re-employment to Plaintiff violates the Articles of the National District MEBA Constitutions before mentioned as well as the 1971 By-Laws of District No. I, MEBA and the terms of the pension agreement among the parties.

4. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57 and 58 declaring that the Defendants were estopped from revoking the permission granted to Plaintiff to return to work because of their previous actions and because of Plaintiff's reliance upon said actions.

5. Enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to reinstate Plaintiff JOSEPH de LORAINÉ to membership in good standing in the National MEBA and to his status as a non-retirement pensioner eligible for re-employment in accordance with the Regulations of the MEBA Pension Trust.

6. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow Plaintiff his costs herein and grant him Fifth Thousand Dollars in damages, both compensatory and punitive, and grant such additional or alternative relief as this Honorable Court may deem just, proper, and equitable.

VIII.

JURY DEMAND

Plaintiff respectfully demands a trial by jury.

Respectfully submitted,

E. JUDSON JENNINGS
Attorney for Plaintiff
2095 Broadway - Room 304
New York, New York 10023
Tel.: 595-1340

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

AFFIDAVIT

72 CIV. 4427 HRT

E. JUDSON JENNINGS, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff. I make this affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedures in opposition to defendants' motion for summary judgment.


2. This is an action brought by the plaintiff to challenge the internal administration and operation of the defendants' labor union and the defendant pension trust. The proof of many of plaintiff's essential allegations depends upon the plaintiff obtaining evidence through pre-trial discovery.

3. There has been no opportunity for pre-trial discovery in this case, and the plaintiff is accordingly unable at this time to produce such evidence before the court.

4. Plaintiff believes that the proof of the allegations of the complaint can be obtained by deposing certain trustees and officers of the defendants and examining the record resolutions, policies and procedures of the defendants insofar

as these relate to the administration of the pension trust.

5. Plaintiff contends to conduct such pre-trial discovery if given the opportunity. In addition, plaintiff believes that cross-examination of one or more of the affiants who have submitted statements in this proceeding may be of very crucial importance to the plaintiff's case.


E. JUDSON JENNINGS

Sworn to before me this
22 day of June, 1973



LINDA E. MANDEL
NOTARY PUBLIC, State of New York
No. 30-760093
Qualified in Nassau County
Commission Expires March 30, 1974

1. Plaintiff submits the following statement, pursuant to rule 9(g) of the rules of this court of material facts as to which the plaintiff contends there exists a genuine issue to be tried:

1. Plaintiff alleges (amended complaint ¶11) that when he ceased working in 1964, defendants maintained a "swinging door" policy, which permitted members to stop working, receive pension benefits, and then return to work at a later time. He alleges that permission to return to work was granted as a matter of course in all cases not involving abuse. The defendants have not proven this allegation to be untrue.

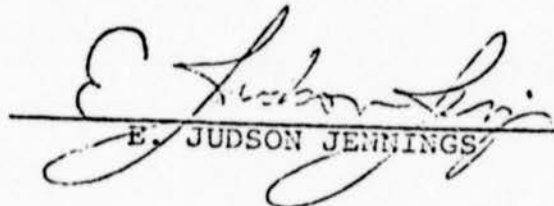
2. Plaintiff alleged that he stopped working in 1964 solely in reliance upon this policy (amended complaint ¶12). This allegation is material to the plaintiff's estoppel claim. The defendants have not proved that this is not true.

3. Plaintiff alleged (amended complaint ¶16) that the defendants have been intentionally and deliberately discriminating against older members in order to keep them out of the union in favor of young workers who are not interested in obtaining pension benefits and who must pay initiation fees

to the union. See the affidavit of E. Judson Jennings, dated April 27, 1973. Defendants have failed to prove that this allegation is not true.

4. Plaintiff has alleged that certain trustees of the MEBA Pension Fund have acted to further the interest of the defendant union in violation of their duties toward the plaintiff as trustees of the pension trust (amended complaint, ¶28, affidavit of E. Judson Jennings, dated April 27, 1973, affidavit of plaintiff, March 8, 1973). The defendants have not proven that this allegation is not true.

5. In addition, or in the alternative, the plaintiff contends that there are allegations of fact which the plaintiff is unable to prove at this time for reasons set forth in the affidavit of E. Judson Jennings, June 22, 1973.


E. JUDSON JENNINGS

Dated: New York, New York
June 22, 1973

TYLER, D.J.

OPINION #40045

This is a motion to dismiss for failure to state a claim upon which relief can be granted. 12(b)(6) F.R.Civ.P. Familiarity with the facts at issue will be assumed since this court has already decided two prior motions in this same case. DeLoraine v. MEBA Pension Trust, Civil No. 72-4427 (S.D.N.Y., filed June 8, 1973); DeLoraine v. MEBA Pension Trust, 355 F. Supp. 89 (S.D.N.Y. 1973). A brief procedural history, however, will be helpful in putting this case in perspective.

On February 21, 1973, this court granted defendants' motion for summary judgment, DeLoraine v. MEBA Pension Trust, 355 F. Supp. 89 (S.D.N.Y. 1973). It was there held that the defendant-pension trust was not a labor organization within the meaning of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. (1973 Supp.), and that in any case, the pension trust came within the exception of § 623(2)(2) of that Act. Pursuant to Rules 15 and 59, F.R.Civ.P., plaintiff moved to "alter or amend" the judgment and for leave to serve and file an amended complaint. Defendants opposed the motion and, in addition, cross-moved under Rule 12(b)(6) to dismiss the amended complaint.

On June 3, 1973, this court vacated judgment, granted leave to amend, and deferred consideration of defendants' motion to dismiss. It is this motion which is now before the court. Since matters outside the pleading have been presented, however, this motion must be treated as one for summary judgment under Rule 56, F.R.Civ.P.

In his amended complaint, plaintiff reiterated his claim under 29 U.S.C. § 621 et seq., and also alleged a cause of action under 29 U.S.C. §§ 157 and 158(b)(1)(a). At argument, however, plaintiff conceded that his only real claim arises under § 302 of the Taft-Hartley Act ("the Act"), 29 U.S.C. § 186(c)(5) (1973 Supp.), as amended Aug. 15, 1973, Pub. L. 93-95, 93rd Cong., 1st Sess. For the reasons hereinafter stated, this action is dismissed for lack of subject matter jurisdiction.

The first issue to which this court must address itself is that of jurisdiction. ^{1/} Paragraphs (a) and (b) of § 302 make it unlawful for an employer to make payments to representatives of his employees and for the representatives to receive payments. Paragraph (c) gives the district court jurisdiction to restrain violations of § 302 without regard to the

^{1/}
See attached Appendix

restrictions imposed by §§ 6 and 20 of the Clayton Act (15 U.S.C. § 17; 29 U.S.C. § 52) or the bar of the Norris-LaGuardia Act (29 U.S.C. §§ 101-115). There is no dispute that payments have been made within the meaning of subsections (a) and (b) of § 302. Subsection (c), however, carves out eight exceptions to the broad prohibitions of subsections (a) and (b) and it is defendants' contention that the payments were permitted by the fifth of these exceptions, § 302(c)(5), which protects payments to certain types of trust funds.

In order to qualify as a § 302(c)(5) trust fund, the pension fund must fulfill five structural requirements. ^{2/} Defendants have admittedly met these requirements. In addition, however, the fund must also have been established for the sole and exclusive benefit of the employees and their dependants. It is this requirement which is at issue in this case. Unlike the other provisions of § 302(c)(5), this requirement is couched in general terms and comes in the preamble of that subsection. Nevertheless, it has been held to be a condition that must be complied with if the employer's payments are to be exempted from the prohibitions of subsections (a) and (b). Lee v. Neabitt, 453 F.2d 1309 (9th Cir. 1973);

Bowers v. Illiana Casual Ins., 393 F.2d 421 (1st Cir. 1968); Lugo,
The Employees Retirement Fund of the Illuminated Products Industry,
Civil No. 73-663 (E.D.N.Y., filed Oct. 12, 1973) (hereinafter "Lugo");
Fiorilli v. Koleswar, 339 F. Supp. 796 (E.D. Penn. 1973), aff'd 474 F.2d
1340 (3d Cir. 1973).

Since the requirement is framed in such general terms, a problem of definition has arisen. The courts have limited the application of this subsection, however, and held that it does not create an independent body of federal trust law; rather, it is limited to insuring compliance with the structural requirements of § 302(c)(5). Bowers v. Illiana Casual Ins., supra; Lugo, supra; Insley v. Joyce, 390 F. Supp. 1223 (N.D. Ill. 1973).

Plaintiff has alleged generally in his complaint and specifically in his briefs that this trust was not administered for the sole and exclusive benefit of the employees. In order for this court to have jurisdiction, however, it must be alleged that the trust was not "established" for the sole benefit of the employees. The focus of the court, thus, must be on the agreement between the employer and the union pursuant to which the pension trust was created. Plaintiff does not allege any

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impropriety in this agreement. In essence, plaintiff is complaining of the trustees' resolution of 1970 in which the permission previously granted to persons to return to work was revoked. Plaintiff asserts that this resolution was motivated by the defendants' desire to force out present workers and replace them with new workers from whom MEBA would receive an initiation fee of one thousand dollars. (Amended Complaint ¶ 17).

While the passage of such a resolution may have been a breach of the trustees' fiduciary duty, it cannot be considered to be a breach of the structural requirements of § 302(c)(5). Plaintiff, however, has argued that if a trust is misadministered at a point in time subsequent to its creation, this misadministration may rise to the dignity of a structural defect. (See Lugo, *supra*; Porter v. Teamsters Health, Welfare and Life Insurance Funds, 321 F. Supp. 101, 104 (E.D. Penn. 1970); but see, Mozelli v. Kelewee, *supra* at 801.)

In Lugo, *supra*, the court took jurisdiction of plaintiff's claim that the procedures used by the trustee in determining eligibility denied him due process. Judge Bartels equated arbitrary and exclusionary activity on the part of the trustees with the existence of an express

exclusionary provision in the trust itself because, as a practical matter, "the result in both cases is exclusion of employees from the benefits of the trust." Lugo, supra at p. 10. The only cases which were cited in support of this analysis were cases in courts of the District of Columbia. Due to an historical peculiarity, however, these courts were not limited by restrictions on federal jurisdiction since they were functioning in their dual capacity. Cf. Palmore v. United States, 411 U.S. 389 (1973).^{3/} Moreover, the fact that a trust fund is improperly structured rather than misadministered may well have practical consequences. Only in the former case are the activities of the trustees to some extent sheltered by the provisions of the contract entered into by the employer and the employees' representatives. If a pension trust is established in accordance with the provisions of § 202(c)(5), a trustee who has breached his fiduciary duty will be unable to defend himself by alleging that his conduct was authorized by the terms of the agreement which created the trust. In state suits, this could well be an important factor.

Even if Lugo were followed, however, this court would still lack jurisdiction. Recognizing that the Second Circuit might well take a

encompassed provision in the trust that it was not an employment contract.
narrower view of its jurisdiction, Judge Bartels limited his finding of jurisdiction to those cases where the trust fund authorizes its trustees to arbitrarily and capriciously exclude certain employees from eligibility. In this case, there are no allegations that the trust fund agreement contained any illegal provisions.

If the misadministration of a pension trust were sufficient to confer jurisdiction under § 302(c) upon the federal courts, a federal law of pension plans would inevitably result. Every breach of fiduciary duty, whether it be financial mismanagement or discriminatory application, can properly be considered to lead to a pension fund which is not being administered for the sole and exclusive benefit of the employees. ^{4/} To create a whole new area of federal jurisdiction and federal law would be contrary to the accepted restrictive interpretation given § 302(c)(5) by the courts, (Bowers v. Udiano Canal Inc., supra; Lugo, supra; Isley v. Joyce, supra), as well as to the Congressional purpose in enacting this section. ^{5/} It may well be that pension trusts should be regulated by federal law; indeed, there are indications that Congress is currently considering just such measures. ^{6/} That decision, however, is one which should properly be made by Congress, not by this court.

Since no structural defect in the establishment of this pension trust has been alleged, this court lacks subject matter jurisdiction to hear this complaint. This case is therefore dismissed. It is so ordered.

Dated: November 26th 1973

J. R. Taylor, Jr.
U.S.D.J.

FOOTNOTES

1/

Although a motion for summary judgment does not go to the issue of jurisdiction, pursuant to Rule 12(b), F.R. Civ.P., this court is empowered to dismiss an action at any point if it determines that it lacks subject matter jurisdiction.

2/

In substance, these requirements are that:

- (1) payments must be held in trust to pay, from principal or income, for employees' medical care, pensions, illness, etc.;
- (2) the detailed basis of such payments must be specified in writing;
- (3) employees and employers must be equally represented and there must be a neutral person or umpire to break deadlocks;
- (4) there must be provisions for an annual audit; and
- (5) separate trusts for pension and annuity funds must be provided.

3/

Interestingly enough, in one of the few D.C. labor cases in which jurisdiction was discussed, the court held that it had jurisdiction under its general equity powers and also under a third party beneficiary theory. Kennet v. United Mineworkers of America, 183 F. Supp. 315 (D. D. C. 1950).

4/

It could be argued that a distinction exists between those cases in which eligibility is denied and those in which mere improper management is alleged. Both situations, however, result equally in a pension which is no longer being administered for the sole and exclusive benefit of the employees.

5/

An examination of the legislative history of this section shows that its general purpose was to prevent corruption in collective bargaining. See, generally, Thompson v. Illinois Casual Ins. Co., 333 U.S. 404, 410 (1948); U. S. v. Brown, 225 F.2d 417, 427 (3d Cir. 1955) (dissenting opinion), rev'd 350 U.S. 299 (1956). Furthermore, as a matter of common sense, it seems hardly likely that Congress intended to back into the creation of a federal law of pension trusts by means of a fifth exception to a general prohibition on payments to the representatives of employees.

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See, e.g. H.R.'s 9469, 9434, 9453, 7747, 976, & 406, 93rd Cong., 1st Sess., (1973).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH DE LORRAINE,

Plaintiff-Appellant,

-against-

MEBA PENSION TRUST, Representing the:
National Marine Engineers' Beneficial Index No.
Association, and MILDRED E. KILLOUGH;
individually and in her capacity as :
Administrator of the MEBA Pension :
Trust, :
Defendants-Appellees. :
-----X

:AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ELIZABETH MELENDEZ, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18
years of age and resides at 3 Haven Plaza, New York, New York.

That on the 5th day of March , 1974, deponent
served the within APPELLANT'S BRIEF and APPENDIX

upon Morton M. Maneker
Proskauer Rose Goetz & Mendelsohn, 300 Park Avenue,
New York, New York 10022

the address designated by said attorney for that purpose by
of Appendix and two copies of brief
depositing a true copy ~~of same~~ in a postpaid properly addressed
wrapper, in an official depository under the exclusive care and
custody of the United States post office department within the
State of New York.

Sworn to before me this
5th day of March 1974.

Jonathan A. Weiss

JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4207273
Qualified in New York County
Commission Expires March 30, 1975

Elizabeth Melendez
ELIZABETH MELENDEZ